SELECTED GUIDELINE APPLICATION DECISIONS FOR THE ELEVENTH CIRCUIT

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — ELEVENTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). Contrary to the defendant's double-counting argument, separate guideline sections apply cumulatively, unless the guidelines specifically direct otherwise, pursuant to Application Note 4 to USSG §1B1.1.

United States v. Nguyen, 255 F.3d 1335 (11th Cir.), *cert. denied*, 534 U.S. 1032 (2001). Pursuant to USSG §1B1.1(a), (b), and (d), in sentencing a defendant convicted of a racketeering conspiracy based on a predicate act of murder, the guidelines require the district court first to depart downward for lack of intent, then to apply the grouping rules to enhance the offense level, rather than applying the grouping rules to the original offense level and afterward making a downward departure.

§1B1.2 Applicable Guidelines

United States v. Farese, 248 F.3d 1056 (11th Cir. 2001). Pursuant to USSG §1B1.2(d) and *United States v. Ross*, 131 F.3d 970 (11th Cir. 1997), the sentence for a conspiracy conviction must be based on the object of the conspiracy (*i.e.*, money laundering) that can be proven beyond a reasonable doubt. Thus, if the guilty plea conviction does not establish the object of the conspiracy beyond a reasonable doubt, the matter must be remanded for the district court to make this determination.

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998).[1] On appeal, the government relied on Application Note 1, §1B1.2, to argue that the defendant fell under the "limited exception" rule that permits consideration of the defendant's actual conduct in a situation where a defendant has stipulated to facts in a plea agreement, even when such conduct did not constitute an element of the offense. The Eleventh Circuit concluded that it was error to apply §2D1.2 on the basis of the defendant's actual conduct of selling drugs near a school, where such

[1] In 2001, the Commission addressed the circuit conflict regarding whether admissions made by a defendant during a guilty plea hearing, without more, can be considered stipulations for purposes of §1B1.2(a) (Applicable Guidelines). The Eleventh Circuit held in *Saavedra* that a statement is a stipulation if it is a part of the defendant's written plea agreement or both the defendant and the government agree that during the factual basis hearing, statements made by defendants constitute stipulations. Effective November 1, 2001, the Commission adopted a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of §1B1.2(a). *See* USSG App. C, Amendment 613.

conduct was not part of the offense of conviction. Citing *Braxton v. United States*, 500 U.S. 344, 346 (1991),[2] the court stated that it was bound by the clear implication of *Braxton* to reject the relevant conduct avenue to sentencing a defendant for a more serious crime than the offense of conviction. The Eleventh Circuit held that the "limited exception" rule did not apply in the defendant's case because the defendant did not stipulate to those facts in his plea agreement.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Cannon, 41 F.3d 1462 (11th Cir.), *cert. denied*, 516 U.S. 823 (1995). The court held that acquitted conduct may be considered by a sentencing court in determining a defendant's sentence because "a verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard"—a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002). The defendant challenged a four-level enhancement under USSG §2G2.2(b)(3). The district court applied the enhancement because the defendant possessed sadistic images and he transmitted different child pornography for which he was convicted. Although the sadistic images were not transmitted, the four-level enhancement would apply pursuant to USSG §1B1.3(a)(1), which provides, "Relevant conduct" includes "all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction . . . ," as long as he possessed the sadistic images at the same time he transmitted the other child pornography.

United States v. Harris, 244 F.3d 828 (11th Cir. 2001), *cert. denied*, 534 U.S. 1105 (2002). The Eleventh Circuit held that the relevant conduct provision did not violate *Apprendi* in this case because the relevant conduct calculations resulted in an increased sentencing guidelines range that fell within the defendant's statutory maximum. The defendant pled guilty to two counts of drug trafficking in violation of 21 U.S.C. § 841. With a calculated drug quantity of 17.8 grams, the defendant's base offense level was 12. The presentence report was prepared based on the total amount of drugs attributable to the defendant through all the transactions alleged in the indictment which resulted in a base offense level of 32. The district court ruled that *Apprendi* prohibited consideration of drug quantities beyond those involved in the offense of conviction. On appeal, the defendant argued that *Apprendi* applied to the relevant conduct provision of the guidelines. The appellate court vacated and remanded defendant's sentence and ruled that *Apprendi* did not apply to the relevant conduct provision of the sentencing guidelines.

United States v. Hunter, 323 F.3d 1314 (11th Cir. 2003). The district court erred in determining defendants' relevant conduct. The defendants participated in a counterfeit corporate check cashing ring that operated over three and a half years. The district court held each

[2] *Braxton* at 346. (Supreme Court held that it was error to base the defendant's sentence on the offense guideline applicable to attempted murder because stipulating to a more serious offense is the only limited exception to the general rule that a court must apply the offense guideline section most applicable to the offense of conviction).

defendant responsible to the entire amount of loss under USSG §1B1.3(a)(1)(B). On appeal, each defendant argued that the district court erred in attributing the entire amount of loss to him or her. The Eleventh Circuit applied the two-pronged test noted in §1B1.3, Application Note 2: A defendant is accountable for the conduct of others that is both in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. Furthermore, the court noted that in order to determine a defendant's accountability for the conduct of others under §1B1.3, the sentencing court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake. The Eleventh Circuit established that the defendant's knowledge about the larger operation, and his agreement to perform a particular act, does not amount to acquiescence to the conduct involved in the criminal enterprise as a whole. *See United States v. Campbell,* 279 F.3d 392, 400 (6th Cir. 2002); *United States v. Studley,* 47 F.3d 569, 575 (2d Cir. 1995). The court concluded that the district court erred in determining defendants' relevant conduct. Although the district court made findings regarding reasonable foreseeability, it did not make particularized findings regarding the scope of each defendant's agreement. The district court's sentence was vacated and remanded.

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002). Pursuant to §1B1.3(a)(1)(b), as clarified in *United States v. Gallo*, 195 F.3d 1278 (11th Cir. 1999), to apply a (gun possession) sentence enhancement based upon co-conspirator conduct, the co-conspirator's conduct (possessing a gun) must be reasonably foreseeable by the defendant.

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001), *en banc*, *cert. denied*, 535 U.S. 942 (2002). *Apprendi* is implicated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the crime of conviction and has no application to, or effect on, cases where a defendant's sentence falls at or below that maximum penalty.

United States v. Shepard, 235 F.3d 1295 (11th Cir. 2000), *reh'g and reh'g en banc denied*, 251 F.3d 165, *cert. denied*, 534 U.S. 856 (2001). The Eleventh Circuit, as refined by *United States v. Sanchez*, 269 F.3d 1250, 1268 n.36 (11th Cir. 2001), *cert. denied*, 535 U.S. 942 (2002), held that the defendant's sentence did not violate *Apprendi* because it fell within the prescribed statutory maximum of 20 years. The defendant was convicted of knowingly and intentionally possessing an unspecified amount of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A) with a statutory maximum of 20 years. The defendant was sentenced to 188 months. At least 50 grams of crack cocaine was attributed to the defendant, and the defendant was sentenced under section 841(b)(1)(B) which provided a sentencing range of 5 to 40 years for violations under section 841(a). On appeal, the defendant argued that the indictment failed to allege the requisite quantity of cocaine to fall within the section 841(b)(1)(B)'s sentencing range of 5 to 40 years, therefore his sentence should be controlled by section 841(b)(1)(C). The Court affirmed defendant's 188-month sentence because the count charged in the indictment authorized a sentence of not more than 20 years (240 months) and thus was not a violation of *Apprendi*.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 70 (2003). Application of a two-level enhancement for possession of a firearm by a co-conspirator

under §2D1.1(b)(1) was proper as it was reasonably foreseeable for relevant conduct purposes under §1B1.3(a)(1)(B).

§1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). USSG §1B1.4 is limited by 18 U.S.C. § 3553(a), and thus it is improper to sentence a defendant, in this case for refusing to cooperate, in order to accomplish a purpose not delineated in section 3553(a).

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

United States v. Armstrong, 347 F.3d 905 (11th Cir. 2003). The appellate court affirmed the district court's denial of retroactive application of Amendments 599, 600, and 635 towards reduction of the defendant's sentence. The Eleventh Circuit noted that Amendment 600 was not listed under §1B1.10(c), and, therefore, there could be no retroactive application with regard to this amendment. The court then noted that Amendment 599 was listed under §1B1.10(c), and although it qualified as an amendment for reduction purposes, it did not apply factually in the defendant's case. Regarding Amendment 635, the defendant argued that even though is was not listed under §1B1.10(c), this amendment was passed to clarify the commentary of §3B1.2 and that it was well settled in the Eleventh Circuit that clarifying amendments are retroactive. The Eleventh Circuit first noted that its cases considering application of a clarifying amendment retroactively were only in the context of a direct appeal or a 28 U.S.C. § 2255 habeas petition. The court then noted that, while consideration of Amendment 635 as a clarifying amendment may be necessary in the direct appeal of a sentence or in a petition under section 2255, it had no relevance to determining retroactivity under 18 U.S.C. § 3582(c)(2)(reduction of sentence). The court joined its sister circuits in holding that amendments claimed in § 3582(c)(2) motions can only be applied retroactively if expressly listed under §1B1.10(c). Furthermore, the court held that "clarifying amendments" were no exception to this rule and may only be retroactively applied on direct appeal of a sentence or under a section 2255 motion. *See United States v. Drath,* 89 F.3d 216 (5th Cir. 1996); *United States v. Perez,* 129 F.3d 255 (2d Cir. 1997); *United States v. Wyatt,* 115 F.3d 606 (8th Cir. 1997); *United States v. Thompson,* 70 F.3d 279 (3d Cir. 1995); *United States v. Dullen,* 15 F.3d 68 (6th Cir. 1994); and *United States v. Avila,* 997 F.2d 767 (10th Cir. 1993).

United States v. Brown, 104 F.3d 1254 (11th Cir. 1997). In a case of first impression in the Eleventh Circuit, the court held that, in declining to apply retroactively an amendment to sentencing guidelines that would have lowered a defendant's offense level for drug-related convictions, a federal district court was not required to present particularized findings on each individual factor listed in the statute governing resentencing. The court clearly considered those factors and set forth adequate reasons for refusing to reduce the sentence, including findings that the defendant's involvement in a crack cocaine conspiracy was significant, that he had lacked a legitimate job for nearly two years as he participated in the conspiracy, and that he failed to show remorse or acceptance of responsibility.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 522 U.S. 953 (1997). The district court did not violate the *Ex Post Facto* Clause by looking to a sentencing guideline amendment, adopted after the completion of defendant's offense, for guidance in determining the extent of his upward sentencing departure. The circuit court joined the majority of circuits in holding that the judge may consider guideline amendments that post-date the applicable guidelines in determining the degree of departure, provided that he considered the appropriate guideline in setting the base offense level. *See United States v. Harotunian*, 920 F.2d 1040, 1046 (1st Cir. 1990) (approving use of amended guideline to guide upward departure); *United States v. Rodriguez*, 968 F.2d 130, 140 (2d Cir.), *cert. denied*, 506 U.S. 847 (1992); *United States v. Bachynsky*, 949 F.2d 722, 734 (5th Cir. 1991), *cert. denied*, 506 U.S. 850 (1992); *United States v. Boula*, 997 F.2d 263, 267 (7th Cir. 1993); *United States v. Saffeels*, 39 F.3d 833, 838 (8th Cir. 1994); *United States v. Tisdale*, 7 F.3d 957, 967 (10th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994). *But see United States v. Canon*, 66 F.3d 1073, 1080 (9th Cir. 1995) (holding that the district court erred in referring to amended guideline to determine reasonable amount of upward departure), *cert. denied*, 531 U.S. 885 (2000).

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995). The circuit court remanded the case for the district court to consider whether a reduction in the defendant's sentence is warranted. The defendant was convicted of structuring financial transactions and conspiracy to structure financial transactions. On appeal, the defendant argued that he was eligible to be resentenced according to the amended version of USSG §2S1.3 which provides a lesser base offense level. In determining whether to apply the retroactive amendment, the court joined the holdings of the First, Third, Eighth and Ninth Circuits that the district court, not the appellate court, should be the initial forum to exercise the discretion concerning whether or not an adjustment is warranted in light of an ameliorative amendment. *See United States v. Coohey*, 11 F.3d 97, 101 (8th Cir. 1993); *United States v. Wales*, 977 F.2d 1323, 1327-28 (9th Cir. 1992); *United States v. Connell*, 960 F.2d 191, 197 (1st Cir. 1992). The circuit court noted the First Circuit's ruling that USSG §1B1.10(a) does not mandate the use of the lesser enhancement, but merely affords the sentencing court the discretion to utilize it. *Connell*, 960 F.2d at 197. In deciding this issue, the Eleventh Circuit declined to follow the Fifth Circuit's approach in *United States v. Park*, 951 F.2d 634, 635-56 (5th Cir. 1992), *cert. denied*, 516 U.S. 1121 (1996), wherein the appellate court determined that the amendment should be applied retroactively and remanded the case to the district court to resentence the defendant accordingly.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997). The district court erred in sentencing the defendant under the *Guidelines Manual* in effect at the time he committed the majority of his crimes. Bailey had fair notice that continuing his crimes in operating his firearms business subjected him to the amended sentencing guidelines in effect when he committed the last of the crimes for which he was convicted. The circuit court remanded for resentencing under the version of *Guidelines Manual* in effect when defendant committed last crime for which he was convicted.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder[3]

United States v. Nguyen, 255 F.3d 1335 (11th Cir.), *cert. denied*, 534 U.S. 1032 (2001). Pursuant to Application Note 1 to USSG §2A1.1, the district court lawfully departed downward where the defendant did not cause death intentionally or knowingly.

§2A3.2 Criminal Sexual Abuse of a Minor Under the Age of Sixteen (Statutory Rape) or Attempt to Commit Such Acts[4]

United States v. Root, 296 F.3d 1222 (11th Cir. 2002), *cert. denied*, 537 U.S. 1176 (2003). The defendant was convicted of attempting to persuade a minor to engage in criminal sexual activity and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor. The two-level enhancement under USSG §2A3.2(b)(2)(B) for unduly influencing the victim to engage in prohibited sexual conduct was applied to the defendant who engaged in Internet chat room communications with an undercover law enforcement officer posing as a 13-year-old female. On appeal, the defendant challenged application of this enhancement by arguing that the victim was not a real person. The court noted that the Sentencing Commission specifically defined the term "victim" to include an undercover law enforcement officer as instructed in §2A3.2, Note 1. Further, the court interpreted the phrase "unduly influenced the victim" as focusing on the actions of the defendant, regardless of whether the victim was a real person or a hypothetical person.

[3]An amendment to become effective November 1, 2004, revises Commentary in §2A1.1(First Degree Murder) to clarify that a downward departure from a mandatory statutory sentence of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, pursuant to 18 U.S.C. § 3553(e); and deletes outdated language.

[4]An amendment to become effective November 1, 2004, increases the base offense level of 24 under §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), in response to the PROTECT Act, to account for the new mandatory minimum of five years for offenses under 18 U.S.C. §§ 2422 and 2423(a); and increases the offense levels for specific offense characteristics under §2A3.2, for custody, care, or supervisory control of the victim by the defendant and for misrepresentation or undue influence by the defendant.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint[5]

United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002). A six-level enhancement pursuant to USSG §2A4.1(b)(1) applies where a written ransom demand was drafted but never delivered because it was "reasonably certain" that ransom note would have been made but for the defendant's apprehension.

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003). The appellate court affirmed the district court's application of a six-level enhancement under §2A4.1(b)(1) for a ransom demand, even though the defendant never made a demand. The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count for using and carrying a firearm during and in relation to a federal crime of violence. At sentencing, the district court applied a six-level upward adjustment pursuant to §2A4.1(b)(1) because it was reasonably certain that a ransom demand would have been made had the kidnappers not been thwarted. On appeal, the defendant challenged the district court's enhancement because a ransom demand was never made. The Eleventh Circuit noted that the facts of this case were similar to those in *United States v. Ferreira,* 275 F.3d 1020 (11th Cir. 2001), *cert. denied,* 535 U.S. 1028 (2002). The court stated that it was bound by the legal precedent of *Ferreira*, and therefore held that the six-level enhancement under §2A4.1(b)(1) was appropriate in any case where it was reasonably certain a ransom demand would have been made. Accordingly, the district court was correct in applying the six-level enhancement under §2A4.1(b)(1). The court also affirmed the district court's application of a four-level enhancement under §2A4.1(b)(2)(A) based on the victim's permanent or life-threatening injuries. At sentencing, the district court applied a four-level increase pursuant to §2A4.1(b)(2) to reflect the victim's permanent or life-threatening bodily injuries. On appeal, the defendant conceded that the victim had suffered serious bodily injuries, and that a two-level enhancement would have been appropriate under §2A4.1(b)(2)(B). The Eleventh Circuit noted that the victim's treating physician had stated that her facial symmetry would never be the same as it was prior to the attack, and that the nerve damage and scarring were likely permanent. The court concluded that, under these circumstances, the district court did not err in determining that the victim's injuries were permanent or life-threatening, and that imposition of a four-level upward adjustment under §2A4.1(b)(2)(A) was appropriate.

§2A6.1 Threatening or Harassing Communications

United States v. Barbour, 70 F.3d 580 (11th Cir. 1995), *cert. denied*, 517 U.S. 1147 (1996). In deciding an issue upon which the circuits disagree, the Eleventh Circuit held that the district court did not err in enhancing the defendant's sentence under USSG §2A6.1(b)(1) for "pre-threat conduct." Section 2A6.1(b)(1) requires a six-level enhancement "[i]f the offense involved any conduct evidencing an intent to carry out the threatening communication." The defendant was convicted of threatening the President of the United States based on statements he made to neighbors expressing his desire to kill the President. The defendant's sentence was

[5]An amendment to become effective November 1, 2004, increases the base offense level for §2A4.1 (Kidnaping, Abduction, Unlawful Restraint) from level 24 to base offense level 32, in response to the PROTECT Act, Public Law 108-21.

enhanced under USSG §2A6.1(b)(1) based on a week-long trip he took to Washington, D.C., ten days before his conversation with his neighbor, during which he went to the Mall everyday with the intent to shoot the President while the President was jogging. The defendant contended that an enhancement for this conduct was improper because the conduct occurred before the threatening communication was made. The circuit court joined the Fourth and Ninth Circuits in holding that pre-threat conduct may be used to support an enhancement under USSG §2A6.1(b)(1). *See United States v. Hines*, 26 F.3d 1469, 1474 (9th Cir. 1994); *but see United States v. Hornick*, 942 F.2d 105 (2d Cir. 1991), *cert. denied*, 502 U.S. 1061 (1992) (pre-threat conduct may not be basis of enhancement). The circuit court stated that as long as the actions show that the defendant has an intent to act on the threat and is likely to do so, it does not matter when that conduct occurred. The circuit court noted the Second Circuit's concern that the government may dig through the defendant's past to find an incident that is only tenuously related to the conduct at hand to find evidence of intent. The circuit court set forth three factors for the district court to consider when determining if pre-threat conduct is probative of the defendant's intent: (1) "the proximity in time between the threat and the prior conduct," (2) "the seriousness of defendant's prior conduct," and (3) "the extent to which the pre-threat conduct has progressed towards carrying out the threat." Noting that the only reason the defendant did not carry out his plan to shoot the President was the fact that the President was out of the country, the circuit court concluded that the defendant's conduct clearly evidenced an intent to carry out his threat.

United States v. Taylor, 88 F.3d 938 (11th Cir. 1996). The district court's application of a six-level enhancement for conduct evidencing an intent to carry out a threat was proper because there was a direct correlation between the pre-threat conduct and the threats for purposes of USSG §2A6.1(b)(1). The defendant urged the appellate court to follow the Second Circuit's opinion in *United States v. Hornick*, 942 F.2d 105 (2d Cir. 1991), *cert. denied*, 502 U.S. 1061 (1992), that only evidence of post-threat conduct can be considered in determining whether to apply the USSG §2A6.1(b)(1) specific offense characteristic enhancement. The appellate court rejected the Second Circuit's interpretation of the guideline and instead joined the Fourth, Seventh, and Ninth Circuits in holding that pre-threat conduct may be considered when applying the enhancement but only when there is a direct connection between the defendant's acts and the threat. The appellate court noted that in determining the probative value of pre-threat conduct courts may consider: (1) "the proximity in time between the threat and the prior conduct"; (2) "the seriousness of the defendant's prior conduct"; and (3)"the extent to which the pre-threat conduct has progressed toward carrying out the threat." *Taylor*, 88 F.3d at 942 (internal citation omitted). Therefore, the essential inquiry for USSG §2A6.1(b)(1) purposes is not related to whether the act took place before of after the threat was made but, whether the facts of the case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and the threat.

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Bates, 213 F.3d 1336 (11th Cir.), *cert. denied*, 531 U.S. 1056 (2000). The district court did not err in imposing sentencing enhancements under USSG §2B3.1 for possession of a dangerous weapon and carjacking during the commission of the robbery. The defendant was not charged under the carjacking statute but his sentence was instead enhanced for attempting a carjacking during the commission of the bank robbery. The defendant argued that, because he only simulated possession of what appeared to be a dangerous weapon, but did not actually possess a weapon or an object that could be perceived as a weapon, the dangerous weapon enhancement did not apply. Further, the defendant argued that the guideline commentary is "inconsistent with the federal statute which it seeks to implement" and that the Commission has "neglected to amend the commentary to be consistent with the statutory amendment adding specific intent as an element." The court found that the defendant's simulated possession of what appeared to be a weapon made the application proper. It further found that if the Commission had intended the definition of carjacking for USSG §2B3.1 to mirror the carjacking statute, it would amend the guideline to refer to the statute. Therefore, it is irrelevant whether a specific intent requirement is necessary because when the defendant demanded the victim's car keys, grabbed his arm, and forced him into the house, he met the requirements for the enhancement by using force or violence or intimidation.

United States v. Cover, 199 F.3d 1270 (11th Cir. 2000). The defendant and co-conspirators, armed with firearms, committed a bank robbery and held 15 people captive. One co-conspirator escaped by carjacking and kidnaping a motorist. The defendant pled guilty to bank robbery and to using and carrying a firearm during a crime of violence. Both the government and the defendant appealed the application of a sentence enhancement under USSG §2B3.1(b)(2)(C) for brandishing, displaying or possessing a firearm. The Eleventh Circuit found the district court erred by enhancing the defendant's sentence five levels under USSG §2B3.1(b)(2)(C) because he was convicted under section 924(c) and the applicable sentencing provision is USSG §2K2.4, which specifies that any specific offense characteristic for the possession or use of a firearm is not to be applied in respect to the guideline for the underlying offense. However, the circuit court found the error was harmless because an alternative ground existed for affirming the application of the USSG §2B3.1(b)(2) enhancement. The court reversed the district court's application of the five-level enhancement under USSG §2B3.1(b)(2)(C) and remanded for application of the six-level enhancement under USSG §2B3.1(b)(2)(B) based on the defendant and his co-conspirator "otherwise using" firearms by holding various persons in the bank at gunpoint. Further, the circuit court stated that the district court did not err in applying an enhancement under USSG §2B3.1(b)(4)(A) and (b)(5) because it was reasonably foreseeable under USSG §1B1.3(a)(1)(B) that the co-conspirator would escape by carjacking and kidnaping a motorist. Finally, the circuit court agreed with the application of an enhancement under USSG §2B3.1(b)(7)(C) for the amount of money left in the bank vault. The commentary to USSG §2B1.1 makes it clear that in a case of a partially completed offense, the offense level is to be determined under USSG §2X1.1, under which a defendant will be held liable for the entire amount of money he attempted to seize, if the offense was interrupted by the intercession of law enforcement authorities. The defendant entered the bank vault area, was

about to insert the key into the lock and enter the combination when someone alerted him to the presence of the police.

United States v. Dudley, 102 F.3d 1184 (11th Cir.), *cert. denied*, 520 U.S. 1203 (1997). On an issue of first impression, the Eleventh Circuit affirmed the district court's two-level enhancement under USSG §2B3.1(b)(1) for property taken from a financial institution after the defendant's conviction for bank robbery. The defendant argued that the enhancement was improperly duplicative because his offense level already fully accounted for the level of culpability ascribed to the crime of conviction, bank robbery. The court applied *de novo* review of sentencing guidelines issues. Citing Eighth and Ninth Circuit precedents of *United States v. McNeely*, 20 F.3d 886, 888 (8th Cir.), *cert. denied*, 513 U.S. 860 (1994), and *United States v. Alexander*, 48 F.3d 1477 (9th Cir.), *cert. denied*, 516 U.S. 878 (1995), the court held that the Commission sought to punish robbery of financial institutions and post offices more severely because those entities kept large amounts of readily available cash and were attractive targets; the defendant failed to bear the burden of demonstrating that the guideline provision was irrational.

United States v. Miller, 206 F.3d 1051 (11th Cir. 2000). In an issue of first impression in the Eleventh Circuit, the court found that a four-level sentence enhancement pursuant to USSG §2B3.1(b)(2)(D) could be applied for "otherwise us[ing]" an object which appeared to be a dangerous weapon during the commission of an attempted robbery. The defendant pled guilty to armed bank robbery during which he lit the fuse of a device that appeared to be, but was not in fact, a bomb, and otherwise threatened a bank teller. He objected to the four-level enhancement, instead claiming he should have received a three-level enhancement under USSG §2B3.1(b)(2)(E) for brandishing, displaying or possessing a dangerous weapon. The circuit court found the term "otherwise used" means "the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." Because he did not just display or brandish the fake bomb but actually lit the fuse, explicitly threatening the teller, the court held the enhancement was properly applied.

United States v. Murphy, 306 F.3d 1087 (11th Cir. 2002). During an unarmed robbery in Georgia, the defendant handed to a bank teller a note stating "you have ten seconds to hand me all the money in your top drawer. I have a gun. Give me the note back now." The defendant had no gun nor did he make an express threat to shoot the teller. At sentencing, the district court applied a two-level enhancement under §2B3.1(b)(2)(F) upon finding that the note constituted a "threat of death." The defendant argued on appeal that the note was not an "express" threat. Consistent with other circuits, the Eleventh circuit determined that this enhancement for "threat of death" would be applicable in cases where the defendant did not make an "express" threat of death because the amended version of §2B3.1(b)(2)(F) did not require an "express" threat to be made. The district court's decision was affirmed.

United States v. Naves, 252 F.3d 1166 (11th Cir.), *reh'g en banc denied*, 273 F.3d 395 (2001). The district court did not engage in impermissible double counting in applying a two-level increase in the base offense level under the robbery guideline for a violation of the carjacking statute, 18 U.S.C. § 2119. The Eleventh Circuit disagreed with the defendant that the base offense level accounted for the level of culpability attributed to the offense of carjacking

and that therefore adding two levels was double counting. The Commission intended to apply the two-level enhancement to the base robbery offense level of 22 for convictions under section 2119, and was, in effect, creating a higher base offense level of 22 for a conviction for carjacking.

United States v. Summers, 176 F.3d 1328 (11th Cir. 1999). The defendant was convicted of robbing a bank, during which he told a teller "I have a gun, give me $500." Prior to a 1997 amendment to USSG §2B3.1(b)(2)(F), the robbery guideline provided a two-level enhancement when a robbery involved an express threat of death. The Eleventh Circuit followed a minority view that would not have deemed the defendant's statement in this case to constitute an express threat of death. Subsequent to the defendant's robbery, USSG §2B3.1(b)(2)(F) was amended to delete the term "express" from the guideline. The court here concluded that this amendment represents a substantive change to the guidelines, rather than a clarification, and, therefore, may not be applied retroactively in those circuits, including the Eleventh Circuit, that had adopted the approach rejected by the Sentencing Commission.

United States v. Vincent, 121 F.3d 1451 (11th Cir. 1997). The district court did not err in applying a three-level enhancement for possession of a dangerous weapon during a robbery, pursuant to USSG §2B3.1(b)(2)(E), even though the victim could not see the weapon. The defendant placed an object against the restaurant manager's side and demanded that she give him the money she was carrying. She did not see the object, but believed it was some type of weapon that was used to perpetrate a robbery. The defendant argued that the enhancement does not apply if the victim of a robbery does not actually see what appears to be a dangerous weapon and that a victim's "subjective thought that it was a weapon" is insufficient to support the enhancement. The court cited its earlier opinion in *United States v. Shores*, 966 F.2d 1383, 1386 (11th Cir.), *cert. denied*, 506 U.S. 927 (1992), that USSG §2B3.1(b)(2)(C) applied, although a toy gun possessed by the defendant during an attempted robbery at the time of his arrest was not brandished or displayed, or even shown to anyone.

United States v. Wooden, 169 F.3d 674 (11th Cir. 1999). As a matter of first impression in the Eleventh Circuit, the court of appeals held that a defendant's holding a handgun about one-half inch from a robbery victim's forehead and pointing it at him constituted an "otherwise use" of the weapon, and not merely a "brandishing" thereof, for purposes of the *Guidelines Manual*, §2B3.1(b)(2)(B) & (b)(2)(C), providing that a six-level enhancement is required if a firearm is "otherwise used," but a five-level enhancement is required if a firearm is "brandished."

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Vallejo, 297 F.3d 1154 (11th Cir.), *cert. denied*, 537 U.S. 1096 (2002). In this case of first impression for the Eleventh Circuit, the defendants challenged the application of a two-level enhancement under §2B3.2(b)(5)(B) for "physical restraint"where the victims, during the robbery of a club, were initially grabbed and held against their will but eventually were free to leave. The defendants argued that the victims' movements between the club and the restaurant next door demonstrated that they were not physically restrained as defined by the guidelines. The court, acknowledging that it had not addressed the scope of "physical restraint" within the context of extortion cases under §2B3.2(b)(5), relied on its interpretation of "physical

restraint" in *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994), as it pertains to a robbery. In *Jones*, the court held that "although no threats were made, the obvious presence of handguns ensured the victims' compliance and effectively prevented them from leaving the room for a brief period . . . ." Relying on *Jones*, the court concluded that the victims in this case were physically restrained because they had no alternative but to comply, and were effectively prevented from leaving the club, even if only for a short time. The fact that the victims were eventually free to leave did not mean that they were not physically restrained.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The defendants were convicted of defrauding Medicare through a referral-kickback scheme; thus, USSG §2B4.1 determined the base offense level. The kickbacks included equipment and lease payments. The defense argued that because these payments were not received directly but instead went to a third party and because they were lawful renumerations, the payments could not count toward calculating the offense level. The only information supporting the calculations was in the PSR. In addition, the government relied on the language of the anti-kickback statute to support its argument that the defendant was liable for the full lease and equipment payments. The court ruled that although the district court did not clearly err by finding that the lease and equipment payments were in fact remuneration for referrals, it failed to make sufficient factual findings regarding the amount of loss and thus the issue was remanded for further findings.

§2B6.1 Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

United States v. Maung, 267 F.3d 1113 (11th Cir. 2001). Pursuant to USSG §2B6.1(b)(2), the base offense level may be enhanced two levels if "the defendant was in the business of receiving and selling stolen property." Reviewing the district court's factual findings for clear error and its application of the guidelines to those facts *de novo*, the court examined the circuit split for determining whether a defendant, who was not the actual thief, was "in the business of receiving and selling stolen property." One test is the "fence" test, requiring proof that the defendant was a person who bought and sold stolen property, thus encouraging others to commit property crimes. The other test examines the totality of the circumstances, focusing on the regularity and sophistication of the defendant's operation.

Here, the defendant argued the enhancement did not apply because he did not personally receive or sell stolen property, but instead merely transported stolen vehicles on behalf of others. Based on the plain language of USSG §2B6.1(b)(2), the court ruled that the enhancement could not apply because the defendant was not literally in the business of "receiving and selling" stolen property. The court based its ruling, in part, by comparing USSG §2B6.1(b)(2)'s language with that of §2B6.1(b)(3), which permits an enhancement "if the offense involved a threat of physical injury or property destruction . . . ." Thus, (b)(2)'s language is focused on the defendant's own activities, whereas (b)(3) incorporates the activities of the co-conspirator's. Accordingly, under this plain language interpretation, the court vacated the enhancement without adopting either the "fence" or "totality" test.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy[6]

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the appellants' base offense levels under USSG §2D1.1 based upon the total amount of marijuana seized during their arrests for conspiracy to manufacture and possess with intent to distribute marijuana plants, including amounts held for "personal use." There was no Eleventh Circuit precedent on this issue, and the appellants asserted that the district court should have followed the Ninth Circuit's decision holding that drugs possessed for personal use should not be included in determining the total drug quantity. *United States v. Kipp*, 10 F.3d 1463, 1465-66 (9th Cir. 1993). The Eleventh Circuit declined to follow the reasoning of the Ninth Circuit, and affirmed the district court's decision to join the majority of circuits in holding that where evidence showed the defendant was involved in a conspiracy to distribute drugs, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir.), *cert, denied*, 510 U.S. 955 (1993); *see also United States v. Snook*, 60 F.3d 394, 395 (7th Cir. 1995); *United States v. Fregoso*, 60 F.3d 1314, 1328 (8th Cir. 1995); *United States v. Wood*, 57 F.3d 913, 920 (10th Cir. 1995). The circuit court held that the marijuana intended for personal use by Antonietti and Fink was properly included by the district court in determining their base offense levels.

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999), *cert. denied*, 532 U.S. 996 (2001). The district court improperly applied a two-level upward adjustment based on defendant's plan to use a private plane to import the narcotics where no importation actually occurred. The Eleventh Circuit found that the plain language of the guideline uses the past tense in stating "if the defendant unlawfully imported or exported a controlled substance . . . in which an aircraft carrier other than a regularly scheduled commercial air carrier was used" and clearly contemplates a completed event which did not occur in this case.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The defendants were convicted of conspiracy to possess and distribute narcotics and possession of controlled substances with intent to distribute. The defendant was assessed a two-level enhancement for the possession of a firearm during a narcotics-related offense. He contested the enhancement, claiming that the government did not demonstrate the firearm found in the hotel room belonged to him or that it was connected to the underlying offense. The Eleventh Circuit stated to whom the firearm belonged was irrelevant because the defendant and his co-defendant had equal dominion over the

[6]An amendment to become effective November 1, 2004, adds a new enhancement to §2D1.1 for distribution of a controlled substance, and the like, through the use of an interactive computer service; provides a definition of "interactive computer service"; increases penalties for GHB and GBL in the Drug Equivalency Tables by setting threshold amounts for triggering the five-year term for GHB at three gallons and a ten-year sentence for GHB at 30 gallons; adds to Commentary a reference to controlled substance analogues and the extent to which potency can be taken into account in determining the appropriate sentence; clarifies that Note 12 applies to a defendant-buyer in a reverse sting operation; provides a special instruction requiring application of the vulnerable victim adjustment under §3A1.1(b)(1) if the defendant distributes a controlled substance to another individual during the commission of a sexual offense; and repeals the current "mitigating role cap" at §2D1.1(a)(3) to replace it with an alternative approach which would provide net reductions that correspond with designated base offense levels.

hotel room where the gun was found. Further, the enhancement was properly applied because the guidelines state that it is to be applied if the weapon is present, unless it is clearly improbable the weapon was connected with the offense. The gun was found in the hotel room directly under packaged bricks of marijuana, suggesting an active connection with the narcotics enterprise.

United States v. Eggersdorf, 126 F.3d 1318 (11th Cir. 1997), *cert. denied*, 523 U.S. 1013 (1998). The district court did not err in denying the defendant's motion to reduce his sentence below the mandatory minimum. The circuit court held that the statute plainly stating that the five-year mandatory minimum sentence applied in cases involving 100 or more marijuana plants, regardless of weight, controlled over the amendment to the sentencing guideline to provide that each marijuana plant would be equivalent of 100 grams, instead of one kilogram, of marijuana.

United States v. Hall, 46 F.3d 62 (11th Cir. 1995). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2D1.1(b)(1) for his possession of a firearm. The defendant argued that the government merely showed the handgun was in the same room as the drug paraphernalia, and did not show it was connected to the offense. Although contrary to the Eighth Circuit, *see United States v. Khang*, 904 F.2d 1219, 1223 n.7 (8th Cir. 1990), the Eleventh Circuit panel agreed with the majority of circuits in holding that "once the government has shown proximity of the firearm to the site of the charged offense, the evidentiary burden shifts to the defense to demonstrate that a connection between the weapons and the offense is clearly improbable." *See United States v. Cochran*, 14 F.3d 1128, 1132 (6th Cir. 1994); *United States v. Cantero*, 995 F.2d 1407 (7th Cir. 1993); *United States v. Corcimiglia*, 967 F.2d 724, 727-28 (1st Cir. 1992); *United States v. Roberts*, 980 F.2d 645, 647 (10th Cir. 1992); *United States v. Restrepo*, 884 F.2d 1294, 1296 (9th Cir. 1989).

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002). The district court did not commit clear error by making a two-level enhancement, pursuant to USSG §2D1.1(b)(1), to the drug defendant's sentence based upon possession of a firearm of a codefendant, who had provided protection for and escorted them while they were transporting drugs and drug proceeds. For the §2D1.1(b)(1) firearms enhancement for the co-conspirator's possession to apply, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (b) the possession was in furtherance of the conspiracy, (c) the defendant was a member of the conspiracy at the time of possession, and (d) the co-conspirator's possession was reasonably foreseeable by the defendant.

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998). The district court did not err in calculating the defendant's base offense level according to the guideline for crack rather than for cocaine hydrochloride. Because the jury's verdict did not specify the object of the defendant's conspiracy, *i.e.*, possession with intent to distribute cocaine hydrochloride or crack cocaine, he could be sentenced under the guideline for crack cocaine only if "the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that offense." *See United States v. McKinley*, 995 F.2d 1020, 1025-26 (11th Cir. 1993), *cert. denied*, 511 U.S. 1036 (1994). The district court's finding that the purpose of the conspiracy was to cook crack was amply supported by the record. The conversion of powder cocaine into crack not only was foreseeable by defendant, but was plainly within the scope of the criminal activity that he undertook. There was evidence that defendant had

discussed "cooking" the cocaine with the informant, and that a codefendant, in the defendant's presence, had told the informant that he was in the business of making crack and needed high quality cocaine for that job.

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995), *cert. denied*, 528 U.S. 1178 (2000). The district court erred in imposing a sentence based upon D-methamphetamine rather than L-methamphetamine when it failed to make findings as to the type of methamphetamine used in the offense. The defendant was convicted of conspiracy to manufacture amphetamine and was sentenced on the basis of D-methamphetamine. The circuit court noted its prior ruling that because methamphetamine requires a significantly harsher sentence under the guidelines than L-methamphetamine, the government bears the burden of production and persuasion as to the type of methamphetamine involved in the offense. *United States v. Patrick*, 983 F.2d 206 (11th Cir. 1993). The Tenth Circuit held that by failing to make any objections to the sentencing court as to the type of methamphetamine, the defendant had waived the issue for appeal. *United States v. Dennino*, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995). The Eleventh Circuit ruled that to satisfy the plain error standard, a party must demonstrate that (1) there was an error in the district court's action; (2) such error was plain, clear or obvious, and (3) the error affected substantial rights, in that it was prejudicial and not harmless. *United States v. Foree*, 43 F.3d 1572, 1578 (11th Cir. 1995) (citing *United States v. Olano*, 1777-79 (1993)). The court further noted that the government had conceded that sentencing based upon D-methamphetamine rather then L-methamphetamine makes a substantial difference in the severity of the sentence imposed. The government and the district court should have known that findings as to the type of methamphetamine were required, and that failure to make such findings had a profound impact on the range of possible sentences imposed.

United States v. Reid, 139 F.3d 1367 (11th Cir. 1998). The district court's lack of findings on the record as to why it did not apply the two-level reduction directed by USSG §2D1.1(b)(6) (applicable if the defendant meets the safety valve criteria) precluded meaningful appellate review. The evidence of record did not demonstrate that defendant did not qualify. The court of appeals vacated the sentence and remanded for further proceedings.

United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003). The appellate court affirmed the district court's application of a two-level captain enhancement under §2D1.1(b)(2)(B). A federal grand jury returned a two-count superseding indictment charging the four-man crew of a go-fast boat with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine. On appeal, the defendant argued that the district court erred in giving him upward adjustments for being the captain of the go-fast boat. First, the defendant argued that he was not a "captain" within the meaning of §2D1.1(b)(2)(B) because the go-fast vessel was nothing more than a speedboat, and the term "captain" referred to an individual listed on a ship's manifest as the captain. The Eleventh Circuit noted that the facts of this case evidenced that the defendant was the captain in an employment, navigational, and operational sense. The defendant identified himself as the captain to boarding coast guard personnel. Additionally, his codefendants testified that they considered him to be the captain because he not only navigated the boat directly or indirectly and was the only crew member who knew its course, but also he had hired the crew and directed their operations on board. The defendant also argued that, under §2D1.1(b)(2), a controlled substance must actually be "imported" for the upward adjustment to

apply. The defendant argued that because there was no actual importation into the United States and no evidence that the cocaine was destined to be delivered to the United States, the enhancement could not apply to him. The Eleventh Circuit noted that the general heading of §2D1.1 provided that the adjustments in §2D1.1 apply not only to substantive drug offenses, but also to attempt and conspiracy offenses. The court adopted the reasoning of the First Circuit and concluded that when the factual predicate in §2D1.1(b)(2)(B) was satisfied, the enhancement was appropriate. *See United States v. Rodriguez,* 215 F.3d 110, 124 (1st Cir. 2000), *cert. denied,* 532 U.S. 996 (2001). Accordingly, the enhancement under §2D1.1(b)(2)(B) was correctly applied. The defendant also raised the issue of double counting. The defendant argued that the district court's application of both the captain enhancement under §2D1.1(b)(2)(B) and the organizer/leader enhancement under §3B1.1 was improper double counting because it resulted in his being punished twice for the same conduct. The Eleventh Circuit noted that neither of the two sentencing factors were a subset of the other. In other words, a defendant may captain a craft or vessel without serving as an organizer or leader in the overall conspiracy. Likewise, a defendant may be an organizer or leader of a drug conspiracy without having anything to do with the actual operation of the vessel used to transport the drugs. The court stated that absent an instruction to the contrary, the adjustments from different guideline sections were applied cumulatively. *See* §1B1.1 comment. n. 4. The court noted that neither of the challenged guidelines included any language or commentary that suggested that they may not be applied cumulatively. To the contrary, the two enhancements embodied conceptually separate notions relating to sentencing because they were designed for two different purposes. Consequently, the district court did not err in concluding that the defendant qualified for enhancements under both §2D1.1(b)(2)(B) and §3B1.1(a).

United States v. Rodriguez, 279 F.3d 947 (11th Cir. 2002). The defendant can be sentenced under USSG §2D1.1(A)(2), based upon death or serious bodily injury resulting from drug use, without violating due process or *Apprendi*, because *Apprendi* does not affect the district court's determinations under the sentencing guidelines, as long as the defendant is sentenced within the statutory maximum. Furthermore, intervening acts of others who failed to immediately call for help when they discovered the victim unconscious were insufficient to relieve the defendant of liability for a drug overdose, even assuming *arguendo* that an intervening cause of death could foreclose application of the death or serious bodily injury enhancement. The court thus did not decide whether an intervening cause exception to the enhancement exists because the defendant did not adduce facts entitling him to the benefit of such an exception.

United States v. Ryan, 289 F.3d 1339 (11th Cir.), *cert. denied*, 537 U.S. 907 (2002). On appeal, the defendant claimed the district court erred by refusing to instruct the jury on sentencing entrapment and challenged his sentencing drug quantity because it included the claimed entrapment amount. The court rejected the defendant's claim for a sentencing entrapment instruction because there was not sufficient evidence of government inducement to require an instruction on sentencing entrapment. Furthermore, the court ruled, citing Application Note 12 to USSG §2D1.1, that it was proper to base the drug quantity upon the drug amount that was agreed-upon to be sold.

United States v. Shields, 87 F.3d 1194 (11th Cir. 1996). The Eleventh Circuit, sitting *en banc*, upheld the district court's opinion that a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense, as opposed to the weight of the marijuana. The circuit court noted that both the text of 18 U.S.C. § 841 and USSG §2D1.1 contain the phrase "involve marijuana plants," but neither suggests that their application depends upon whether the marijuana plants are harvested before or after the growers are apprehended. The circuit court rejected defendant's argument that the district court should not have applied the equivalency provision of USSG §2D1.1 because the dead plants were not "marijuana plants" within the meaning of the guidelines. An interpretation of USSG §2D1.1 which depends upon the state of affairs discovered by law enforcement officers (*ie*., whether plants are live or have been harvested) contradicts the principle of relevant conduct. The circuit court stated that relevant conduct includes all acts and omissions committed by the defendant. If defendant's relevant conduct includes growing marijuana plants, the equivalency provision applies, and the offense level will be calculated using the number of plants.

United States v. Sloan, 97 F.3d 1378 (11th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997). The district court did not err refusing to apply the rule of lenity to the defendant's sentence for distributing crack cocaine, despite the amendment of USSG §2D1.1(c), Note D to clarify the definition of "cocaine base" in the period between the defendant's commission of the offense and his sentencing. The appellate court concluded that prior to the amendment in question crack cocaine was within the category of drug known as "cocaine base" which Congress intended to punish more harshly than other forms of cocaine under both 21 U.S.C. § 841 and the sentencing guidelines. The court rejected the defendant's argument that the fact that "cocaine" and "cocaine base" are chemically synonymous rendered the meaning of the terms "cocaine" and "cocaine base" ambiguous prior to the amendment. The rule of lenity comes into operation only if Congress's intent with respect to statutory language (and sentencing interpretations) remains ambiguous after considering the structure, legislative history, and motivating policies behind the legislation. A finding as to congressional intent to impose more stringent penalties upon section 841(b) offenses involving crack cocaine is applied to construction of the guidelines' distinction between cocaine and cocaine base offenses given that the two work as a unified whole. The appellate court found that Congress intended to address the increased use of crack cocaine by creating a tiered punishment system and increasing penalties under section 841(b) for a subset of the broad cocaine-related substances "described in clause (ii) which contain cocaine base." The legislative history and motivating policies support this interpretation of Congress's intent. Finally, although Congress's later view as to the meaning of pre-existing law is not dispositive, its recent rejection of the guideline amendment to end the 100 to 1 weight ratio disparity confirms its intent. Although the court determined that Congress could have enacted a statute which more clearly expressed its intentions, the statute was not so ambiguous as to lead the defendant to conclude that his action in distributing a form of rock-like cocaine was entitled to treatment under the lower tier penalties of section 841(b) or USSG §2D1.1(c). Therefore, the rule of lenity does not apply to this case.

United States v. Smith, 127 F.3d 1388 (11th Cir. 1997). The district court did not err in enhancing the defendant's base offense level for possession of a firearm in relation to a drug offense, even though he did not possess a firearm during the offense of conviction. The base

offense level enhancement under the sentencing guidelines for possession of a firearm in relation to drug offense is authorized if the weapon was possessed during the offense of conviction or during the related relevant conduct.

United States v. Timmons, 283 F.3d 1246 (11th Cir.), *cert. denied*, 537 U.S. 1004 (2002). When a defendant is convicted of an 18 U.S.C. § 924(c) offense as well as an underlying drug offense, the district court is precluded from applying a weapons enhancement pursuant to USSG §2D1.1(b)(1).

United States v. Trout, 68 F.3d 1276 (11th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996). In an issue of first impression, the circuit court concluded that the rule of lenity does not require a sentencing court to apply 21 U.S.C. § 841(b)(1)(C) when it is unclear whether a defendant's sentence is governed by section 841(b)(1)(A)(viii) or section 841(b)(1)(B)(viii). The defendant argued that the district court failed to follow the rule of lenity because the court did not sentence him under the less severe "catchall" provision of section 841(b)(1)(C). The circuit court agreed with the Fifth Circuit's holding that the rule of lenity applies to sentencing under section 841(b)(1)(B) prior to its 1990 amendment. *See United States v. Sherrod*, 964 F.2d 1501, 1505 (5th Cir.), *cert. denied*, 506 U.S. 1041 (1992). However, the circuit court concluded that the rule of lenity directs the court "to apply the lesser penalty when a statute presents an ambiguous choice between two punishments," not to forsake both possibilities and to search for an even more lenient alternative. The court noted that it is clear that Congress intended for section 841(b)(1)(A)(viii) or (b)(1)(B)(viii) to apply in situations involving more than 100 grams of methamphetamine. In this case, because the district court sentenced the defendant under the less severe section 841(b)(1)(B)(viii), the rule of lenity was applied. The court also rejected the defendant's argument that section 841(b)(1) was unconstitutionally vague and failed to provide the defendant with sufficient notice to satisfy due process concerns.

United States v. Zapata, 139 F.3d 1355 (11th Cir. 1998). The district court erred in "rounding up" its drug quantity calculations for purposes of determining the defendant's offense level. The amount of marijuana attributable to the defendant was 44 pounds, which the district court determined would yield a base offense level of 18 based on between 20 and 40 kilograms of marijuana. However, the 44 pounds of marijuana actually converted to 19.9584 kilograms of marijuana, resulting in a base offense level of 16. The court of appeals noted that the drug quantity table is clear and unambiguous that the conversion of 44 pounds of marijuana equals 19.9584 kilograms. The plain meaning of the guideline directs a base offense level of 16. Although sentencing may be based on fair, accurate, and conservative estimates of drug quantities attributable to a defendant, it cannot be based on calculations of drug quantities that are merely speculative. Because the rounding up was not based on any legal or factual support, the sentence was vacated and remanded for resentencing.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998). The district court erred in applying USSG §2D1.2 to the defendant's drug conviction because he was not charged with a violation of 21 U.S.C. § 860, selling drugs near a school. Section 2D1.2 establishes base offense levels for violations of 21 U.S.C. § 860. The court of appeals held that section 860 is a

substantive criminal offense that must be charged, not a mere sentence enhancer for certain classes of more general drug offenses. The defendant's uncharged but relevant conduct is irrelevant to determining which guideline is applicable to an offense; relevant conduct is properly considered only after the applicable guideline is selected, when the court is analyzing the various sentencing considerations within the guideline chosen. Thus, the defendant's actual conduct was not the proper basis for applying USSG §2D1.2, and the court should have applied USSG §2D1.1, which establishes the base offense level for 21 U.S.C. § 841(a), the statute under which the defendant was convicted.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud and Deceit[7]

United States v. Bald, 132 F.3d 1414 (11th Cir. 1998). The district court properly included as actual loss all credit card charges made by defendants, including unauthorized purchases returned for credit before detection.

United States v. Bush, 126 F.3d 1298 (11th Cir. 1997), *cert. denied*, 522 U.S. 1141 (1998). The district court erred in failing to apply the enhancement for more than minimal planning where defendant embezzled funds through several fraudulent loans. The district court also erred in departing downward on the basis of "single act of aberrant behavior." The defendant's conduct was clearly not a single, "spontaneous and thoughtless act[,] rather than one which was the result of substantial planning," as required by circuit precedent in *United States v. Withrow*, 85 F.3d 527, 530-31 (11th Cir.), *cert. denied*, 519 U.S. 944 (1996). Whether "society has an interest" in incarcerating a particular defendant is a matter addressed by the guidelines generally, and is irrelevant to the question whether a particular defendant's conduct was in fact "aberrant" within the meaning of Ch. One, Pt. A.

United States v. Daniels, 148 F.3d 1260 (11th Cir. 1998). The district court did not err by refusing to exclude from the loss calculations $81,250 paid to the victim by the defendant's errors and omissions insurer. The court of appeals noted that the partial reimbursement did not change the amount the defendant embezzled, but only substituted his insurance company as another victim.

United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). The district court erred in calculating loss pursuant to USSG §2F1.1. The defendant was convicted of possession and interstate transportation of stolen securities, bank fraud and attempted escape. The defendant argued on appeal that he deserved an evidentiary hearing to determine the number of bonds attributable to him and their value. The defendant further argued that the stolen bonds were worthless on their face. The circuit court ruled that the district court erred in failing to hold an evidentiary hearing to determine the actual number of bonds for which the defendant was responsible, and the face value of the bonds. The circuit court further ruled that for sentencing purposes the face value of bonds provides a reasonable quantification of the risk to unsuspecting

[7] *See* USSG, App. C, Amendment 617.

buyers or lenders. *See United States v. Jenkins*, 901 F.2d 1075, 1084 (11th Cir.), *cert. denied*, 498 U.S. 901 (1990).

United States v. Orton, 73 F.3d 331 (11th Cir. 1996).[8] On appeal, the defendant objected to the way the district court calculated the amount of the loss used to determine the offense level enhancement pursuant to §2F1.1(b)(1). The Eleventh Circuit addressed the issue of how "loss" should be determined under §2F1.1 for cases involving a "Ponzi" or pyramid scheme, where a defendant has partially repaid fraudulently obtained funds before discovery of the scheme. The court noted that the sentencing court conducted a detailed accounting of the losses incurred by each victim using a method the court called the "loss to losing victims" method. The amount of loss was calculated by totaling the net losses of all victims who lost all or part of the money they invested. The court concluded that this method employed by the court resulted in a more accurate estimate of loss to victims and held that the district court's estimate of loss was reasonable.

United States v. Schlei, 122 F.3d 944 (11th Cir. 1997), *cert. denied*, 523 U.S. 1077 (1998). The district court did not err in considering intended loss in calculating the defendant's offense level, even though the defendant was caught in a government sting operation. *Cf. United States v. Sneed*, 34 F.3d 1570, 1584 (10th Cir.1994) (holding that the intended loss in cases of government sting operations is zero).

United States v. Stevenson, 68 F.3d 1292 (11th Cir. 1995). In a matter of first impression, the Eleventh Circuit ruled "that the sentencing guidelines permit the cumulative enhancement of a sentence under the more than minimal planning provision of USSG 2F1.1 and the aggravating role provision of USSG 3B1.1. The court noted that a majority of the circuits have held that the guidelines permit the application of both enhancements. *See United States v. Massey*, 48 F.3d 1560, 1570 (10th Cir.), *cert. denied*, 515 U.S. 1167 (1995); *United States v. Godfrey*, 25 F.3d 263, 264 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994); *United States v. Wong*, 3 F.3d 667, 670-72 (3d Cir. 1993); *United States v. Rappaport*, 999 F.2d 57, 60-61 (2d Cir. 1993); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993), *cert. denied*, 510 U.S. 1050 (1994); *United States v. Kelly*, 993 F.2d 702, 704-05 (9th Cir. 1993); *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991); *United States v. Boula*, 932 F.2d 651, 654-55 (7th Cir. 1991). The Eleventh Circuit reasoned that neither the text nor the commentary of USSG 2F1.1 or USSG 3B1.1, suggests an intent to preclude the cumulative application of those sections. The circuit court also relied on a recent amendment to USSG 1B1.1, stating that adjustments from guideline sections are to be applied cumulatively absent an instruction to the contrary to support its decision. The circuit court added that the unofficial commentary highlighting the 1993 amendments in the November 1993 *Guidelines Manual* explains that the amendment was in response to the Sixth Circuit's decision in *Romano*, *infra*. The district court was affirmed.

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[8]Effective November 1, 2001, the Commission adopted the approach of the Eleventh Circuit that excluded the gain to any individual investor in the scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme. *See* USSG, App. C, Amendment 617.

United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996). The district court did not err in its calculation of the amount of loss under USSG 2F1.1. The defendant was convicted of conspiracy to make false statements and making false statements on a disaster loan application to the Small Business Administration (SBA), wherein he averred that he had suffered over $360,000 in losses from damage caused by Hurricane Andrew, although he actually suffered no loss. The defendant's scheme was discovered prior to the processing of the application, and no actual loss was incurred by the SBA. Based on the finding that the defendant intended the SBA to incur a $360,000 loss, the district court enhanced the defendant's base offense level under USSG 2F1.1. The defendant argued that an adjustment under USSG 2F1.1 is only applicable if "some actual dollar amounts were lost." In rejecting this argument, the circuit court noted the commentary to USSG §2F1.1, which states that "the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss)" and "where the intended loss is greater than the actual loss, the intended loss is to be used" in calculating the amount of loss. The circuit court concluded that this language indicates that the defendant's intent to cause a loss is the relevant inquiry, and "the fact that no loss occurred is immaterial." *See also United States v. Menichino*, 989 F.2d 438 (11th Cir. 1993) (sentence enhancement under USSG §2F1.1 appropriate despite fact that loan, secured via fraudulent appraisal, was never issued). The decision of the district court was affirmed.

United States v. Wai-Keun, 115 F.3d 874 (11th Cir. 1997), *cert. denied*, 522 U.S. 1135 (1998).[9] At sentencing, the district court arrived at a loss of $2,500,000 by adding the number of completed false cards, unembossed cards, signature panels, other unembossed cards found safe in the hotel where some of defendants were staying, and a list of account numbers, all of which were listed as items considered to be “access devices” by the court. On appeal, the Eleventh Circuit found the contention that only completed fake cards can be counted was without merit. It further found that nothing in §2F1.1, Application Note 7, required that the defendant be capable of inflicting the loss he intended and, as such, it is not required that an intended loss be realistically possible.

[9]Effective November 1, 2001, the Commission resolved the conflict relating to the meaning and application of intended loss by providing that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender. *See* USSG App. C, Amendment 617.

Part G Offenses Involving Prostitution, Sexual Exploitation or Minors, and Obscenity

§2G1.1 Promotion A Commercial Sexual Act or Prohibiting Conduct[10]

United States v. Murrell, 368 F.3d 1283 (11th Cir. 2004). The defendant appealed the two-level sentencing enhancement under § 2G1.1(b)(2)(b) for an offense involving a victim between the ages of 12 and 16. In an online chat, the defendant agreed to pay an undercover detective to have sex with a minor. On appeal, the defendant maintained that the sentencing enhancement does not apply because the person whom he communicated with was not a minor and the victim was fictitious. In the case of first impression in the Eleventh Circuit, the court considered whether a fictitious victim justifies an increased sentence. The Seventh Circuit upheld a similar enhancement for a fictitious victim in *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000). Because the Sentencing Commission specifically provided that undercover officers are victims for the purposes of §2G1.1, the court deduced that the enhancement is directed toward intent of the defendant rather than actual harm to the victim. Thus, the enhancement applied whether the minor victim is real, fictitious or an undercover officer. Additionally, the defendant argued that his two-level sentencing enhancement under §2G1.1(b)(5) is inapplicable because his inducement was not directed toward a minor. Under the same reasoning used above, the court of appeals held that inducement of a minor may take place indirectly and the enhancement applies.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

United States v. Bender, 290 F.3d 1279 (11th Cir.), *cert. denied*, 537 U.S. 1037 (2002). The defendant argued that the district court erred in applying §2G2.2 (trafficking), rather than §2G2.4 (possession), specifically contending that enhancement under §2G2.2 for violence and distribution for gain did not apply because he merely possessed, as opposed to distributed, child pornography. Because this issue was not presented to the district court, it was reviewed for plain error. Because the defendant received and transmitted child pornography via computer, §2G2.2 applied. The defendant also challenged a four-level enhancement under §2G2.2(b)(3) based upon pornographic materials that portrayed sadistic conduct. Pursuant to *United States v. Garrett*, 190 F.3d 1220 (11th Cir. 1999), a photograph is sadistic, within §2G2.2(b)(3), when it depicts the "subjection of a young child to a sexual act that would be painful," to include vaginal and anal penetration by adult males. That standard was met here. The defendant finally challenges a five-level enhancement under USSG §2G2.2(b)(2) for distribution for gain. Pursuant to the 2000 amendment of this section, the enhancement applies if the distribution was for the receipt or expectation of receipt of a thing of value. It applies here because, joining several other circuits, the court holds that when a defendant trades child pornography in

[10]An amendment to become effective November 1, 2004, makes conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct), and adds a special instruction to apply §3D1.2 (Groups of Closely Related Counts) as if there had been a separate count of conviction for each victim in those cases in which more than one victim died.

exchange for other child pornography, he has distributed child pornography so that he would receive a thing of value—other child pornography.

United States v. Caro, 309 F.3d 1348 (11th Cir. 2002). The district court erred in refusing to apply a four-level enhancement, pursuant to §2G2.2(b)(3), based on its reasoning that the government had to present expert medical evidence to support a finding that the images of child pornography the defendant possessed were sadistic, masochistic, or otherwise violent. The defendant was convicted of possession, receipt, and transportation of child pornography. The defendant had in his possession on his computer 30,000 images of child pornography, including depictions of children from infants to teenagers engaged in sexual activity that showed very young children engaged in anal and vaginal intercourse with adult males and children in bondage or being tortured. Citing *United States v. Garrett*, 190 F.3d 1220, 1224 (11th Cir. 1999), and *United States v. Bender*, 290 F.3d 1279, 1286 (11th Cir.), *cert. denied*, 537 U.S. 1034 (2002), the Eleventh Circuit noted that it affirmed that the act of anal and vaginal penetration of children between eight and eleven years of age would be considered sadistic, and that it had not imposed a requirement that the government must present expert testimony to support a §2G2.2(b)(3) enhancement. Accordingly, the court concluded that the four-level enhancement was warranted under that subsection.

United States v. Dodds, 347 F.3d 893 (11th Cir. 2003). The appellate court held that when a district court applies §2G3.1(c)(1)'s cross-reference, sentencing is appropriate under §2G2.2 only if the government can show receipt with intent to traffic. The defendant was found guilty of knowingly possessing material that contained images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and knowingly receiving obscene pictures in violation of 18 U.S.C. § 1462. At the sentencing, the PSR recommended that the defendant be sentenced under §2G2.4, however the district court agreed with the government and sentenced the defendant under §2G2.2 resulting in a higher sentence. On appeal, the defendant argued that the district court improperly sentenced him under §2G2.2, which he claimed required proof that he intended to "traffic" the child pornography, when he should have been sentenced under §2G2.4, which punished simple possession. The defendant further argued that if "receiving" was construed as "receiving with intent to traffic," then virtually every case of child pornography would require sentencing under §2G2.2 because §2G2.4 would only be applicable in the rare case that a person possessed child pornography without ever "receiving" it. The defendant relied on *United States v. Sromalski,* 318 F.3d 748 (7th Cir. 2003), to support his argument. The Eleventh Circuit noted that both the plain text and the history of the guidelines strongly indicated that §2G2.2 was meant to punish crimes related to the trafficking of child pornography, while §2G2.4 was reserved for punishing those who merely possessed child pornography. The court held that when a district court applied §2G3.1(c)(1)'s cross-reference, sentencing was appropriate under §2G2.2 only if the government could show receipt with the intent to traffic. The court further noted that merely showing that a defendant was in possession of a large number of illegal images would usually not be sufficient to imply an intent to traffic. Accordingly, the case was remanded to the district court to determine whether there was sufficient evidence to support the conclusion that defendant had "received" the pornography with intent to traffic, and therefore to consider whether §2G2.2 or §2G2.4 applied.

See United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002), §1B1.3, p. 2.

United States v. Hall, 312 F.3d 1250 (11th Cir. 2002), *cert. denied*, 538 U.S. 954 (2003). The district court erred in not applying a four-level enhancement for sadistic conduct where the image portrayed an adult male vaginally penetrating a young girl.

United States v. Laihben, 167 F.3d 1364 (11th Cir.), *cert. denied*, 527 U.S. 1029 (1999). At sentencing, the district court included a 1995 New York robbery conviction as a prior felony conviction for the defendant and accordingly assigned the defendant a base offense level of 20, pursuant to §2K2.1(a)(4)(A). On appeal, the defendant argued that the district court erred in calculating his offense level because he was convicted of the New York robbery after committing the federal crimes at issue in this case. The defendant further argued that his 1995 conviction was not a prior felony conviction under §2K2.1(a). The Eleventh Circuit noted that the commentary to §2K2.1 directed the sentencing court to count any "prior conviction that receives any points under §4A1.1(Criminal History Category)." Relying on *United States v. Walker*, 912 F.2d 1365 (11th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991)[11] the court concluded that the defendant's 1995 sentence for robbery qualified for criminal history points for purposes of §4A1.1 because it was imposed prior to sentencing for the instant offense. Because it qualifies for criminal history points, it is therefore a prior conviction for purposes of §2K2.1(a).

United States v. Probel, 214 F.3d 1285 (11th Cir.), *cert. denied*, 531 U.S. 939 (2000). In deciding an issue upon which the circuits disagree, the Eleventh Circuit held that the district court did not err in finding that the defendant did not have to act for a pecuniary interest or other gain in distributing child pornography to have his base offense level enhanced by five levels under USSG §2G2.2. The defendant pled guilty to distributing child pornography over the Internet to an undercover law enforcement officer without any pecuniary gain, and argued that the enhancement did not apply. The circuit court joined the majority of courts in finding that based on the plain language of the guidelines and the application notes, pecuniary or other gain is not required for the enhancement to apply. Although USSG §2G2.2(b)(2) provides an increase by the number of levels from the table in USSG §2F1.1 corresponding to the retail value of the material, "distribution" in USSG §2G2.2 should be given its ordinary meaning of "to dispense" or "to give out or deliver." *See United States v. Lorge*, 166 F.3d 516 (2d Cir), *cert. denied*, 526 U.S. 1058 (1999); *United States v. Canada*, 110 F.3d 260 (5th Cir.), *cert. denied*, 522 U.S. 875 (1997); *United States v. Hibbler*, 159 F.3d 233 (6th Cir. 1998), *cert. denied*, 526 U.S. 1030 (1999); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), *cert. denied*, 529 U.S. 1029 (2000); *but see United States v. Black*, 116 F.3d 198 (7th Cir.), *cert. denied*, 522 U.S. 934 (1997) (§2G2.2(b)(2) implies a transaction for pecuniary gain by measuring the number of levels of an enhancement by the retail value of the material); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999) (expressing disbelief that the Commission would distinguish between commercial pornographer who sells $40,000 and one who sells $80,000 worth, but not between a person who gives away a magazine and one who markets $40,000 worth of magazines).

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[11] *Walker* at 1366. (court concluded that this language [§4A1.2, Note 1] makes clear that the sentencing court should consider sentences imposed before the time of sentencing rather than before the time of the federal offense).

§2G2.4 Possession of Materials Depicting a Minor Engaging in Sexually Explicit Conduct

See United States v. Bender, 290 F.3d 1279 (11th Cir.), *cert. denied*, 537 U.S. 1037 (2002), §2G2.2, p. 22.

United States v. Harper, 218 F.3d 1285 (11th Cir. 2000). The district court correctly found that separate computer files on one computer disk counted as distinct "items" under USSG §2G2.4 providing for a two-level enhancement if the child pornography offense involved possessing ten or more items. The defendant pled guilty to one count of possession of child pornography when his probation officer found a computer zip disk containing 600 to 1,000 pictures involving the sexual exploitation of minors in more than ten files, and argued that the disk constituted only one "item" for sentencing purposes. Agreeing with the Second, Seventh, and Ninth Circuits, the Eleventh Circuit found that a computer hard drive is more similar to a library than a book because a hard drive can store thousands of documents and visual depictions, and that each file within the drive is akin to a book or magazine. *See United States v. Demerritt*, 196 F.3d 138 (2d Cir. 1999); *United States v. Hall*, 142 F.3d 988 (7th Cir. 1998); *United States v. Fellows*, 157 F.3d 1197 (9th Cir. 1998), *cert. denied*, 528 U.S. 852 (1999).

United States v. Whitesell, 314 F.3d 1251 (11th Cir. 2002), *cert. denied*, 539 U.S. 951 (2003). In addressing an issue of first impression in the Eleventh Circuit, the court found that the term "causing" as used in §2G2.4(c)(1) "does not require a defendant to have physical contact with or personally photograph the victim . . . ." The defendant pled guilty and was convicted of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The defendant met the victim in an Internet chat room, and, during the course of their acquaintance, the victim sent him visual images of herself engaging in sexually explicit conduct. At sentencing, the district court applied the cross-reference under §2G2.4(c)(1) to §2G2.1 based on its finding that the defendant caused or permitted the victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The defendant contended that, in light of *United States v. Chapman*, 60 F.3d 894, 900 n.8 (1st Cir. 1995), which stated in a footnote that §2G2.1 applied only if the defendant had physical contact with or personally photographed the victim, evidence of his direct verbal requests or suggestions was insufficient to prove that he "caused" or "permitted" the victim to engage in the conduct at issue. The Eleventh Circuit declined to adopt the First Circuit's definition of "causing" in *Chapman*, identifying it as too restrictive and, instead, adopted the dictionary definition of "causing" as "producing an effect, result, or consequence" or "[being] responsible for an action or result." The court concluded that the time frame in which the victim transmitted the pornographic photograph and the defendant made his boastful comments showed that the defendant's coaxing directly resulted in the victim photographing herself engaging in sexually explicit conduct.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release

United States v. Bozza, 132 F.3d 659 (11th Cir. 1998). The district court did not err in imposing a sentencing enhancement for commission of an offense while out on bond pursuant to USSG §2J1.7 without having notified the defendant of the enhancement prior to the entry of his guilty plea. Section 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his or her guilty plea.

United States v. Williams, 59 F.3d 1180 (11th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996). The Sentencing Commission did not overstep its bounds in promulgating USSG §2J1.7, which calls for a three-level enhancement if the defendant commits a federal offense while on release. "18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act."

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition[12]

United States v. Adams, 329 F.3d 802 (11th Cir. 2003). The district court correctly applied a two-level enhancement to the defendant's sentence pursuant to USSG §2K2.1(b)(4). On appeal, the defendant argued that because he was charged with possession of a stolen firearm, enhancing the offense level based solely upon the stolen nature of the firearm constituted impermissible double counting. The Eleventh Circuit noted that it had never addressed the issue of whether the application of the two-level enhancement under §2K2.1(b)(4) constituted double counting when the offense of conviction involves a stolen firearm. The court stated that its sister circuits had found the enhancement appropriate when a defendant's base offense level was not determined under subsection (a)(7). *See United States v. Goff,* 314 F.3d 1248, 1249-50 (10th Cir.), *cert. denied*, 538 U.S. 1066 (2003); *United States v. Raleigh,* 278 F.3d 563, 566-67 (6th Cir.), *cert. denied,* 535 U.S. 1119 (2002); *United States v. Shepardson*, 196 F.3d 306, 311-14 (2d Cir. 1999), *cert. denied*, 528 U.S. 1196 (2000); *United States v. Hawkins,* 181 F.3d 911, 911-13 (8th Cir.), *cert. denied*, 528 U.S. 981 (1999); *United States v. Brown,* 169 F.3d 89, 93 (1st Cir. 1999); *United States v. Luna,* 165 F.3d 316, 322-23 (5th Cir.), *cert. denied*, 526 U.S. 1126

[12]An amendment to become effective November 1, 2004, increases the enhancement for the offense involving a destructive device if the destructive device was a man-portable air defense systems (MANPADS), portable rocket, missile, or device used for launching a portable rocket of missile; provides an upward departure for non-MANPADS destructive devices where the two-level enhancement for such devices did not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk of public welfare, and the risk of death or serious bodily injury that the destructive device created; adopts the statutory definition of "destructive devices" provided in 26 U.S.C. § 5845(f) as the guideline definition and similarly substituted statutory definitions for the definitions of "ammunition" and "firearm"; and increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive devices.

(1999); *United States v. Turnipseed,* 159 F.3d 383, 385-86 (9th Cir. 1998). The court adopted the same reasoning as its sister circuits and held that the district court correctly applied the two-level enhancement.

United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995). The district court did not err in applying the cross-reference provision in USSG §2K2.1 in calculating the defendant's sentence. The defendant pled guilty to making false statements to acquire firearms and possession of a firearm by a convicted felon. The defendant was involved in an attempted armed robbery in which her co-conspirator carried a gun. The district court applied the cross-reference provision in USSG §2K2.1 which directs the court to sentence the defendant according to the guideline for the offense that the defendant committed while in possession of the firearm. The defendant argued on appeal that the cross-reference provision was not applicable because she did not possess a firearm in connection with the attempted armed robbery, because the plan did not include the use of weapons, because she did not have possession of a weapon during the attempted robbery, and because she did not know a firearm was present during her participation in the crime. In a matter of first impression, the Eleventh Circuit applied the Pinkerton rule of conspirator liability to USSG §2K2.1. In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Supreme Court held that conspirators are liable for the reasonably foreseeable acts of their co-conspirators in furtherance of the conspiracy. The circuit court recognized that defendants who illegally possess firearms will be sentenced under USSG §2K2.1(a) and (b), but defendants who then use that weapon in another crime are eligible for a longer sentence under the guideline applicable to the subsequent crime, which allows the sentencing court to impose a sentence that "reflects the magnitude of the crime." The circuit court held that since the co-conspirator's possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a "drug rip-off," the possession of the firearm could be imputed to the defendant.

United States v. Fernandez, 234 F.3d 1345 (11th Cir. 2000), *cert. denied*, 532 U.S. 988 (2001). The district court did not err in finding that a plea of *nolo contendere*, where an adjudication of guilt has been withheld, qualifies as a “conviction” for calculating the defendant’s base offense level under the guidelines. The defendant pled guilty to being a felon in possession of a firearm. The PSR set the base offense level at 24, in accordance with USSG §2K2.1(a)(2), based on a finding that he had two prior felony convictions. One offense relied upon was for carrying a concealed weapon to which the defendant pled *nolo contendere* but for which there was no adjudication of guilt, and the defendant argued that this offense could not be used to determine his base offense. The guidelines clearly state if a prior conviction results in a criminal history point under USSG §4A1.1, the conviction is to be considered a conviction under USSG §2K2.1(a)(2), and an offense that resulted in a plea of *nolo contendere* with no adjudication of guilt is to be included in the criminal history calculation of USSG §4A1.1.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). The defendant contended that the district court improperly enhanced his sentence for possession of a firearm in connection with a felony offense different from the offense of conviction, pursuant to USSG §2K2.1(b)(5). Jackson was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court concluded that, during his arrest, Jackson assaulted and battered the arresting officers. In connection with that separate offense, the district court determined that Jackson had reached for his gun during the struggle at the time of his arrest, thus justifying a

four-level increase per USSG §2K2.1(b)(5). The Court held that Jackson's attempted use was sufficient to convert his possession of the firearm into possession of the firearm "in connection with" the assault and battery. Relatedly, the defendant challenged as impermissible double counting the district court's three-level enhancement under USSG §3A1.2(b) for having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer. In *United States v. Stevenson*, 68 F.3d 1292, 1294 (11th Cir. 1995), the Court established that "[d]ouble counting a factor during sentencing is permitted if the Sentencing Commission (Commission) intended that result and each guideline section in question concerns conceptually separate notions relating to sentencing." Moreover, the presumption is that the separate guidelines apply cumulatively unless specifically directed otherwise. Under these standards, both sections 2K2.1(b)(5) and 3A1.2(b) were properly applied.

United States v. Jamieson, 202 F.3d 1293 (11th Cir. 2000). The district court erred in increasing the defendant's sentence pursuant to USSG §2K2.1(a)(3) based on his possession of a Norinco semiautomatic rifle which is not one of the specifically banned firearms under the Violent Crime Control Act, and which did not display two or more statutorily proscribed characteristics. The defendant pled guilty to felonious possession of a firearm, and the government argued that his Norinco was a prohibited semiautomatic assault weapon as described in 18 U.S.C. § 921(a)(30) and therefore, a two-level enhancement was warranted. The district court incorrectly agreed with the government because although all models of Norinco "Avtomat Kalashnikovs" were prohibited, the model the defendant possessed was not that type of Norinco firearm. Further, section 921(a)(30)(B) bans semiautomatic rifles regardless of make, model, or identity of manufacturer, if they have two or more proscribed characteristics listed. Because the firearm was not specifically listed and did not display two of those characteristics, the circuit court vacated his sentence.

United States v. Paredes, 139 F.3d 840 (11th Cir.), *cert. denied*, 525 U.S. 1031 (1998). The district court did not err in enhancing the defendant's offense four levels under USSG §2K2.12(b)(5) for using the firearm in connection with another felony offense. The defendant argued that the enhancement was barred by application note 2 to USSG §2K2.4, which prohibits application of any specific offense characteristic for the possession, use, etc., of a firearm when sentencing for an underlying offense to a section 924(c) conviction. The defendant argued that, due to the grouping of the section 922(g) conviction with his robbery conviction (the predicate offense for his section 924(c) conviction), the section 922(g) conviction should be deemed to be the underlying offense for purposes of the application note. The court of appeals rejected this argument, holding that the "underlying offense" for purposes of USSG §2K2.4, Application Note 2, is the "crime of violence" or "drug trafficking offense" that serves as the basis for the section 924(c) conviction. The fact that the crime of violence was grouped with the section 922(g) offense for purposes of sentencing does not change the conclusion. "Underlying offense" must be the crime during which, by using the gun, the defendant violated section 924(c).

United States v. Rhind, 289 F.3d 690 (11th Cir.), *cert. denied*, 537 U.S. 1114 (2002). The defendants challenged a four-level enhancement under USSG §2K2.1(b)(5) for possession of firearms, arguing that sufficient evidence failed to demonstrate that they possessed the firearms "in connection with" the underlying felony offense. The court interpreted "in connection with"

according to its ordinary meaning, including that the firearm does not have to facilitate the underlying offense. The court concluded that adequate facts supported the enhancement here because while passing counterfeit currency while driving across several states, the defendants kept a disassembled handgun under the rear passenger seat and ammunition for the gun in the console between the front seats.

United States v. Simmons, 338 F.3d 1335 (11th Cir. 2004). The defendant argued that the district court erred in considering the 2002 sentencing guidelines rather than basing his sentence entirely on the 2001 guidelines, which were in effect when the defendant was convicted but not when he was sentenced. The circuit court determined that the 2001 guidelines should be applied. The court chose to make an upward departure based on the fact that, had the career offender guideline been applicable the defendant's sentence would have been much higher.

United States v. Vega, 365 F.3d 988 (11th Cir. 2004). In reversing the district court, the appellate court determined that the Commission exceeded its authority in providing for a sentencing enhancement for crimes involving semi-automatic weapons legally possessed under the "grandfather" provision of the 1994 assault weapons ban. The court stated that it could not reconcile §2K2.1(a)(5) with 18 U.S.C. § 922(v)(2). The court noted that subsection 922(v)(2) exempts all weapons purchased or transferred before Congress enacted the assault weapons ban. The court noted that in making it lawful to possess pre-ban semi-automatic weapons, Congress expressed a desire to protect this activity. The court then stated that it made little sense to provide for increased base offense levels for protected conduct. The court noted that the Sixth Circuit also held that §2K2.1(a)(5) cannot coexist with 18 U.S.C. § 922(v)(2). *See United States v. O'Malley,* 332 F.3d 361 (6th Cir. 2003).

United States v. Willis, 106 F.3d 966 (11th Cir. 1997). The district court erred in finding that the defendant who pled *nolo contendere* in a state court to charges of carrying a concealed firearm and grand theft of a firearm, but whose adjudication of guilt was withheld, was "convicted" of a felony within the meaning of the federal firearms statute. The defendant argued that his possession count should have been dismissed because he pled *nolo contendere* to the alleged predicate offenses and such a plea did not amount to a prior conviction within the meaning of 18 U.S.C. § 922(g)(1). The statute provides, in relevant part, that what constitutes a conviction of a crime punishable by imprisonment for a term exceeding a year shall be determined in accordance with the law of the state in which proceedings are held. In reviewing Florida law, the court was faced with an issue of first impression and relied on the United States District Court for the Northern District of Florida who had previously addressed this issue. In *United States v. Thompson*, 756 F. Supp. 1492 (N.D. Fla. 1991), that court dismissed the four section 922(g)(1) counts, finding that the defendant had not been "convicted" of a prior felony within the meaning of the statute because he had pled *nolo contendere*. The district court concluded that where a *nolo* plea is being used as an essential element of another offense, Florida law would not consider such plea to be a conviction. The appellate court agreed with this interpretation, and held that the district court had erred in defining such a plea as a conviction.

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996), *cert. denied*, 520 U.S. 1247 (1997). The appellate court affirmed the district court's calculation of the defendant's sentence

pursuant to USSG §2K2.1. The defendant argued that USSG §2K2.1, as amended, was invalid because it substantially increased the punishment level without adequately explaining the reasons for the changes, as required by the Administrative Procedures Act ("APA"). The appellate court disagreed, and held that "Federal courts do not have authority to review the Commission's actions for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned."

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998). The district court did not err in denying Bazemore's 28 U.S.C. § 2255 motion to vacate his conviction for using or carrying a firearm in connection with a drug trafficking offense. *Bazemore* argued that the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), meant that the conduct he pled guilty to, participating in a drug trafficking crime in which a codefendant carried a weapon, did not violate 18 U.S.C. § 924(c). The court of appeals upheld the district court's finding that *Bazemore* had aided and abetted his codefendant in "carrying" the weapon, and that he was therefore liable for the crime and his plea was properly accepted.

United States v. Brown, 332 F.3d 1341 (11th Cir. 2003). The defendant pled guilty to two counts: using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The issue on appeal was whether Amendment 599 and the current version of USSG §2K2.4 precluded the application of a §2K2.1(b)(5) four-level enhancement for possession of a firearm in connection with another felony offense to defendant's section 922(g) conviction for being a felon in possession of a firearm, when he was also sentenced for his section 924(c) conviction for using or carrying firearms during and in realtion to a drug trafficking offense. Effective November 2000, Application Note 2 of USSG §2K2.4 was amended. One of the main reasons for this amendment was to avoid the duplicative punishment that resulted when sentences were increased under both statutes and the guidelines for substantially the same harm. In other words, the Sentencing Commission chose to equate the wrongs being punished by a §2K2.1(b)(5) enhancement and a section 924(c) sentence and required the election of one or the other. Accordingly, the Eleventh Circuit held that the district court erred in enhancing defendant's sentence. The §2K2.1(b)(5) enhancement applied to defendant's section 922(g) conviction and defendant's conviction under section 924(c) punished twice the same wrong of possessing a firearm in connection with the underlying felony of drug trafficking. Furthermore, the court also noted that Amendment 599 abrogated *United States v. Flennory,* 145 F.3d 1264 (11th Cir. 1998), *cert. denied*, 525 U.S. 1185 (1999), to the extent that the new application note expanded the definition of underlying offense to include the relevant conduct punishable under USSG §1B1.3. The court noted that the Sentencing Commission had cited *Flennory* in its Reason for Amendment and explained that the Eleventh Circuit's narrow interpretation was under-inclusive of the circumstances in which the application note applied to prohibit double counting.

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001). The district court erred in applying a five-level enhancement based on the brandishing or possession of a firearm by a co-

defendant, in light of an amendment to the guidelines. That amendment prohibits any weapon enhancement for the underlying offense if a codefendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted. Multiple defendants were convicted of robbery, Hobbs Act violations, carjacking, and firearm violations, and the district court applied the five-level enhancement for brandishing or possession of a firearm by a codefendant, which was consistent with its finding that another defendant also wielded a firearm. The effect of the amendment is that relevant conduct cannot be used to enhance the offense level for the Hobbs Act conspiracy, substantive Hobbs Act violations, and carjacking convictions of one defendant based on the fact that a codefendant brandished or possessed a weapon.

See United States v. Paredes, 139 F.3d 840 (11th Cir.), *cert. denied*, 525 U.S. 1031 (1998), §2K2.1, p. 28.

United States v. White, 305 F.3d 1264 (11th Cir. 2002). The district court denied the defendant's motion to apply Amendment 599 to §2K2.4 to reduce his sentence because the amendment did not materially change the relevant language of §2K2.4's Application Note 2. The defendant was convicted of armed assault and attempted robbery of a United States postal worker and use of a firearm during a crime of violence. At sentencing, the district court applied the 1992 version of the sentencing guidelines, §2B3.1(a) and assigned a base offense level of 20 for the underlying robbery offense, and applied a variety of specific offense characteristics, including a seven-level enhancement under §2B3.1(b)(2)(A) because a firearm was discharged. With defendant's criminal history category of III and a final adjusted offense level of 35, his guideline range was 210 to 262 months. However, Application Note 2 under §2K2.4 required 60 months to be subtracted from the guideline range to reflect the 60-month mandatory sentence for the section 924(c) offense in order to avoid double counting. After the defendant was sentenced, Application Note 2 was altered further in November 2000, Amendment 599, by stating: "If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." Unlike Amendment 489, Amendment 599 was made retroactive and encouraged an upward departure. The court determined that this change was not a substantive change but a clarification and as such did not prohibit the application of the weapons enhancement when determining the defendant's sentence.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States[13]

United States v. Alfaro-Zayas, 196 F.3d 1338 (11th Cir. 1999).[14] At sentencing, the defendant made an oral motion to depart downward on the grounds that the 1992 drug conviction overstated the seriousness of his criminal conduct because the conduct underlying that conviction and his classification as an aggravated felon was a $20 sale of cocaine base. The district court denied the motion, stating that it did not have the discretion to depart downward and that §4A1.3 did not apply. On appeal, the Eleventh Circuit stated that §4A1.3 provides the sentencing court with the discretion to move along the horizontal axis of the sentencing table when it believes the criminal history category assigned by the Sentencing Commission is not appropriate; however, this section does not authorize the sentencing court to adjust the offense level when the court finds that the underlying conduct does not support the assigned level. The court determined that the district court correctly concluded that it was not empowered under §4A1.3 to depart downward. Although there were several potential bases which authorized the district court to depart downward from the sentence calculated for the defendant under §2L1.2(b)(1)(A), the court agreed that none of these bases were applicable in the defendant's case. The court concluded that the district court correctly noted that its disagreement with the policy under which the defendant's sentence was calculated did not provide it with authority to depart downward.

United States v. Anderson, 328 F.3d 1326 (11th Cir. 2003). The defendant was deported in 1991 after he pleaded *nolo contendere* to a Florida felony drug offense. The district court imposed a 12-level enhancement pursuant to USSG §2L1.2(b)(1)(B) because the defendant had been previously deported after a conviction. On appeal, the defendant argued that a *nolo contendere* plea with adjudication withheld did not qualify as a conviction within the meaning of §2L1.2(b)(1)(B). The Eleventh Circuit noted that, although §2L1.2 did not refer to 8 U.S.C. § 1101(a)(48)(A), the term "conviction" as used in §2L1.2(b) was governed by the definition set forth in section 1101(a)(48)(A). *See also United States v. Zamudio,* 314 F.3d 517, 521-22 (10th Cir. 2002). Accordingly, a conviction for purposes of §2L1.2(b)(1)(B) included a *nolo contendere* plea with adjudication withheld as long as punishment, penalty, or restraint on liberty was imposed.

United States v. Christopher, 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001). The district court did not err in finding that the defendant's state conviction for shoplifting was an "aggravated felony" for purposes of USSG §2L1.2. The defendant was given a 16-level enhancement for illegally reentering the United States after being deported following

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[13] *See* USSG App. C, Amendment 658.

[14] Effective November 1, 2001, the Commission deleted Application Note 5 which provided that a downward departure may be warranted based on the seriousness of the offense if the 16-level enhancement applied and three criteria were met. This amendment rendered moot a circuit conflict regarding whether the three criteria were the exclusive basis for a downward departure from the 16-level enhancement. *See* USSG App. C, Amendment 632.

a conviction for misdemeanor shoplifting offenses. He was sentenced to 12 months but his sentence was suspended. Agreeing with other circuits, the circuit court found the language of the statute did not apply to only those crimes that are felony crimes by nature. Congress defined a term of art and "aggravated felony" includes certain misdemeanants who receive a sentence of one year. *See United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), *cert. denied*, 533 U.S. 904 (2001); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999).

United States v. Drummond, 240 F.3d 1333 (11th Cir. 2001). The district court did not err in applying the 16-level enhancement for menacing as an aggravated felony. The Eleventh Circuit found a prior state conviction for menacing qualified as an "aggravated felony" for purposes of USSG §2L1.2. The defendant was sentenced to one year of imprisonment for a previous state misdemeanor of menacing. Menacing is a crime of violence under the definition in the enhancement because menacing under the state law includes placing another in fear of physical injury, serious injury or death. As a crime of violence, the defendant's prior state conviction for menacing qualified as an aggravated felony.

United States v. Fuentes-Rivera, 323 F.3d 869 (11th Cir.), *cert. denied*, 124 S. Ct. 149 2003). The defendant pled guilty to re-entry into the United States after a conviction in California for an aggravated felony, burglary in the first degree. Pursuant to USSG §2L1.2(b)(1)(A)(ii), the district court enhanced the defendant's sentence because his deportation occurred after the felony conviction for a "crime of violence." On appeal, the defendant argued that, since burglary under California law did not include the use, attempted use, or threatened use of physical force as an element of the offense, his 1995 conviction for first-degree burglary did not qualify as a "crime of violence." The Eleventh Circuit noted that it had not decided the question of whether an offense must include the physical-force element and be listed in the application notes in order to qualify as a "crime of violence" under §2L1.2(b)(1)(A)(ii). The court cited the analysis of the Eighth Circuit in *United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002), *cert. denied*, 537 U.S. 1138 (2003). The Eighth Circuit noted that the Sentencing Commission included "burglary of a dwelling" in Application Note 1(B)(ii)(II)'s list of offenses, despite the fact that burglary, or at least "generic" burglary, had never had as an element the use, attempted use, or threatened use of physical force against another. In other words, the Eighth Circuit rejected the interpretation that Application Note 1(B)(ii) required an offense to have the physical force element and be listed, because it would render Application Note 1(B)(ii)(II) surplusage. The Eleventh Circuit adopted the Eighth Circuit's analysis and held that the district court did not err in determining that burglary of a dwelling was a "crime of violence" under USSG § 2L1.2(b)(1)(A)(ii).

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000). The district court erred in enhancing the defendant's sentence upon his guilty plea to illegally reentering the United States after his deportation because his grand theft conviction was not an "aggravated felony" at the time of his deportation and reentry. The defendant had been found guilty in state court for grand theft, third degree, and was sentenced to five years' probation. The circuit court stated that "aggravated felony" under the statute is defined in terms of the sentence actually imposed, and includes a theft offense if the term of imprisonment imposed was at least a year. Had the defendant received a suspended sentence followed by probation, the enhancement may have

been applicable. But agreeing with the Fifth Circuit, the circuit court found when a court does not order a period of incarceration and then suspend it, instead imposing probation directly, the conviction is not an "aggravated felony" under USSG §2L1.2, and vacated the sentence. *See United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999).

United States v. Lozano, 138 F.3d 915 (11th Cir. 1998). The district court's application of the aggravated felony enhancement, based on the defendant's previous deportation having been subsequent to the commission of an aggravated felony, did not violate the *Ex Post Facto* Clause. The defendant had been convicted for cocaine distribution and deported in 1992. He was discovered in the United States in 1996 and pled guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). The court imposed a 16-level increase under USSG §2L1.2(b)(2) because the previous deportation was subsequent to an aggravated felony. The defendant argued the enhancement violates the *Ex Post Facto* Clause by punishing him for earlier conduct under a law and guideline not in effect at the time of the conduct. The court of appeals agreed with other courts which have considered the issue in finding that the law does not apply to events occurring prior to its enactment; the offense for which defendant was sentenced was being found in the United States after illegally reentering the country. At the time of the commission of that offense, the penalties were unambiguous. *See, e.g.*, *United States v. Baca-Valenzuela*, 118 F.3d 1223, 1231 (8th Cir. 1997); *Unites States v. Cabrera-Sosa*, 81 F.3d 998, 1001 (10th Cir.), *cert. denied*, 519 U.S. 885 (1996); *United States v. Saenz-Forero*, 27 F.3d 1016, 1020 (5th Cir. 1994); *United States v. Arzate-Nunez*, 18 F.3d 730, 734 (9th Cir. 1994).

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001). The Eleventh Circuit held the definition of "aggravated felony" under the enhancement in USSG §2L1.2 referred to the term of imprisonment imposed and not the term actually served. The defendant was found guilty after a bench trial for illegally entering the United States after being deported following a conviction in state court for attempted burglary and aggravated assault. The sentence imposed was one to five years for the attempted burglary and three to ten years for the aggravated assault. However, he was deported after serving only seven months and the district court suspended the rest of the sentence upon his deportation. Agreeing with other circuits, the circuit court concluded that the length of sentence imposed determines whether crimes of theft or violence constitute aggravated felonies under USSG §2L1.2 and affirmed the application of the enhancement. *See United States v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999); *United States v. Banda-Zamora*, 178 F.3d 728 (5th Cir. 1999); *United States v. Tejeda-Perez*, 199 F.3d 981 (8th Cir. 1999).

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir.), *cert. denied*, 534 U.S. 913 (2001). The district court did not err in holding a violation of a state statute criminalizing sexual offenses that do not rise to the level of rape or sexual battery and which are committed against children under 16 years of age constituted an "aggravated felony" under USSG §2L1.2. The defendant pled guilty to illegally reentering the United States after being deported. Prior to his deportation, the defendant pled *nolo contendere* to a second degree state felony for a lewd, lascivious, or indecent assault or act upon or in the presence of a child. He argued that "aggravated felony" under USSG §2L1.2 is ambiguous because it is not clear whether physical contact is a necessary element of the offense. The Eleventh Circuit held the term "sexual" in "sexual abuse of a minor" as found in "aggravated felony" indicates the perpetrator's intent in

committing the abuse is to seek libidinal gratification and "sexual abuse of a minor" is therefore not limited to physical abuse.

United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996). The district court did not err in applying 18 U.S.C. § 1326(b)(2) as a sentencing enhancement provision. The defendant pled guilty to being a deported alien found unlawfully in the United States in violation of 18 U.S.C. § 1326. The defendant claimed that because the indictment to which he pled guilty did not mention any of his prior convictions, he was not given notice that he was pleading guilty to any offense other than being found in the United States after having been deported. The defendant claimed that the court's use of 18 U.S.C. § 1326(b)(2) as a sentence enhancement provision rather than as a statement of a separate offense violated his due process rights. 18 U.S.C. § 1326(b)(2) applies to any alien who has been deported and is found at any time in the United States after having been convicted of an aggravated felony. The statute mandates a fine and a custodial sentence not to exceed 15 years. The circuit court recognized the line of cases from the Ninth Circuit which interpret 18 U.S.C. § 1326(b)(1) and (b)(2) to state separate crimes, not sentencing enhancements. *See United States v. Campos-Martinez*, 976 F.2d 589 (9th Cir. 1992) (sections 1326(a) and 1326(b) state separate crimes); *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992) (same) (citing dicta in *United States v. Arias-Granados*, 941 F.2d 996 (9th Cir. 1991) (plea bargain)). The court noted that four other circuits have rejected the Ninth Circuit's line of cases and have applied 18 U.S.C. § 1326(b) as a sentence enhancement provision. *See United States v. Crawford*, 18 F.3d 1173 (4th Cir.) (section 1326(b) is a sentence enhancement provision), *cert. denied*, 513 U.S. 860 (1994); *United States v. Forbes*, 16 F.3d 1294 (1st Cir. 1994) (same); *United States v. Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993) (King J., dissenting), *cert. denied*, 510 U.S. 1076 (1994)(same); *see also United States v. Cole*, 32 F.3d 16 (2d Cir.) (a sentence-enhancement provision rather than a separate offense), *cert. denied*, 513 U.S. 993 (1994). In making its ruling, the circuit court relied on its holding in *United States v. McGatha*, 891 F.2d 1520, 1522-23 (11th Cir.), *cert. denied*, 495 U.S. 938 (1990), where it treated 18 U.S.C. § 924(e)(1) as a sentence enhancement provision, and not as the creation of a new, separate offense which must be alleged in the indictment and proved at trial. The court joined four other circuits that discussed the legislative evolution of 18 U.S.C. § 1326 through its various amendments and concluded that Congress intended section 1326 to denounce one substantive crime—unlawful presence in the United States after having been deported, with the sentence to be enhanced incrementally for those aliens who commit the offense after having been deported following convictions for "nonaggravated" or "aggravated" felonies. The Supreme Court adopted this position in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

§2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

United States v. Polar, 369 F.3d 1248 (11th Cir. 2004). The district court properly applied the guidelines to the defendant including an upward increase of six levels because the offense involved at least 25 passports and an increase pursuant to §2L2.1(b)(2)(B). The defendant personally possessed false Alien Documentation Identification Telecommunication stamp and was linked to several others. The defendant appealed on the grounds that there was insufficient proof to link him to the required number of passports. However, the testimony of government investigators provided sufficient evidence because the sentencing court may rely on reliable hearsay. Secondly the defendant appealed the upward four-level adjustment under §2L2.1(b)(3) based on the defendant's knowledge that the passports would be used to facilitate the commission of an offense other than an offense involving immigration. The defendant contends that the offense here should have been classified as an immigration offense. Adopting the approach previously taken by the Seventh and Ninth Circuit courts, the Eleventh Circuit adopted a narrow definition of the term that only encompassed those laws that criminalize conduct *necessarily* committed in connection with the admission or exclusion of aliens. The possession of the stamps here was not considered necessarily in connection with the admission or exclusion of aliens. The four-level increase was affirmed.

United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997), *cert. denied*, 524 U.S. 909 (1998). The district court erred in applying USSG §2F1.1, the guideline for fraud, deceit and forgery, to calculate the defendant's sentence because USSG §2L2.1, involving counterfeit identification documents, more aptly characterized the offense conduct. The defendant's conduct, encouraging and inducing aliens to reside in the United States, making false statements on applications for social security cards, and producing social security cards without lawful authority, arose from her participation in a conspiracy to unlawfully produce social security cards and sell them to illegal aliens.

Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws

§2N2.1 Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

United States v. Kimball, 291 F.3d 726 (11th Cir. 2002). The defendant who was convicted of distributing a prescription drug without a prescription with the intent to defraud or mislead was found guilty of an offense that necessarily involved fraud and thus was properly sentenced under the fraud guideline, rather than under USSG §2N2.1 dealing with any food, drug, biological product, device, cosmetic, or agricultural product.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). Per USSG §2P1.1(b)(2), any defendant convicted of escape is entitled to a seven-level reduction of the base offense level if the defendant "escaped from a non-secure custody and returned voluntarily within 96 hours." If, while away from the facility, the defendant committed any offense punishable by a term of imprisonment of one year or more, the reduction does not apply, per USSG §2P1.1(b)(2). The reduction was not applicable here because the defendant committed such offenses and because he did not return voluntarily, per Application Note 2.

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

United States v. Giordano, 261 F.3d 1134 (11th Cir. 2001). The district court did not err in calculating, under USSG §2R1.1(b)(2), the volume of commerce that was affected by the scrap metal companies' price-fixing conspiracy. The defendants were convicted of price-fixing. On appeal, the defendants argued that the one-level enhancement under USSG §2R1.1(b)(2) did not apply to them because: 1) the volume of commerce affected in the price fixing scheme was well below the $400,000 threshold necessary to trigger the application of the one-level enhancement, instead of the government figures of $636,153.66 and $839,043.80 accepted by the district court; and 2) the conspiracy was a "non-starter."[15] *Id.* at 1144-45. The court found that the district court based its volume of commerce calculation on sales during the period between October 24, 1992 and December 31, 1992, a period within which the court determined the conspiracy to be effective based on the evidence provided by the government.[16] The appellate court concluded that because the conspiracy was effective during that period of time, the district court "did not err in including in the volume of commerce affected all sales of the affected products between October 24, 1992, and December 31, 1992, which resulted in a figure that exceeded the threshold of $400,000." *Id.*

[15]The Sixth Circuit noted in its opinion that the Second Circuit, in *United States v. SKW Metals & Alloys, Inc*., 195 F.3d 83 (2d Cir. 1999), reasoned that "if the conspiracy was a non-starter, or if during the course of the conspiracy there were intervals when the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals are not 'affected by' the illegal agreement, and should be excluded from the volume of commerce calculation."

[16]*Giordano* at 1147. The Government presented detailed pricing summaries showing that the defendants' sales during this period were consistently at or near the prices agreed upon at Sea Ranch [party to the illegal agreement].

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity[17]

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). The district court erred in refusing to apply USSG §2S1.1 to defendants' convictions under 18 U.S.C. § 1956. Given the proposition that "a district court cannot use the post-trial sentencing process to call the jury's verdict into question," a district court may not refuse to consider convictions listed in the PSR. In this case, the district court did not apply the section 1956 convictions, reducing the defendant's base offense level by ten levels in this case. The appellate court reviewed *de novo* the choice of base offense level and the issue of whether the district court had authority to make a downward departure. The appellate court held that the jury found the defendants guilty of violating section 1956, and thus guideline 2S1.1 must be applied. It rejected the district court's rationale that the gravamen of the defendants' unlawful conduct was fraud and misapplication of RTC funds, holding that "Congress intended to criminalize a broad array of money laundering activity, and included within this broad array is the activity committed" by the defendants. However, the appellate court remanded for further findings with respect to the district court's second justification that the sentence reflected a downward departure under USSG §5K2.11. The appellate court noted that the First and Eighth circuits have rejected downward departures in similar situations. *See United States v. Pierro*, 32 F.3d 611, 620 (1st Cir. 1994), *cert. denied*, 513 U.S. 1119 (1995); *United States v. Morris*, 18 F.3d 562, 569 (8th Cir. 1994). On remand, the district court must identify how or why the defendants' conduct "caused or threatened less harm than typical money laundering."

United States v. De LaMata, 266 F.3d 1275 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002). The defendants were convicted of bank fraud, money laundering, false statements, false entries, and misapplication of bank funds. The district court grouped the offenses, then applied the guideline (USSG §2S1.1) that produced the highest offense level, pursuant to USSG §3D1.3(b). A defendant argued that the fraud guideline more fully captured the nature of his crimes, and that his money laundering, via bank fraud, was atypical for that crime. The Eleventh Circuit disagreed. It first noted that not applying the money laundering guideline would nullify the jurors' verdict on that issue; moreover, it found that the money laundering here–separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conduct–was within the heartland of USSG §2S1.1.

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). The district court did not err in calculating the amount of funds involved in the defendant's money laundering scheme. The defendant pled guilty to wire fraud, mail fraud and money laundering in relation to a "Ponzi" scheme. The defendant's money laundering and fraud convictions were grouped pursuant to USSG §3D1.2. On appeal, the defendant argued that the district court erred in determining the value of funds by considering the total amount of money collected in the "Ponzi" scheme. The circuit court noted that when offenses are grouped pursuant to USSG §3D1.2, a sentencing court is "required to consider the total amount of funds

[17] *See* USSG App. C, Amendment 634.

that it believed was involved in the course of criminal conduct." The circuit court ruled that the amount of money collected by the defendant through fraud was co-extensive with the sums involved in the charged and uncharged money laundering counts thereby warranting a ten-level enhancement for laundering in excess of $20 million.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax: Fraudulent or False Returns, Statements, or Other Documents

United States v. Hunerlach, 197 F.3d 1059 (11th Cir. 1999). The defendant pled guilty to filing false tax returns for three years, and the district court enhanced his sentence four levels pursuant to USSG §2T1.1(b)(2) because it determined the total "tax loss" to be over $3 million, including the accrued interest and penalties. Because the commentary to USSG §2T1.1 states that "tax loss" does not include interest and penalties, the Eleventh Circuit found for purposes of determining the base offense level for willfully evading payment of tax, the loss does not include interest and penalties, and vacated the defendant's sentence.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The district court erred in failing to apply the three-level reduction under USSG §2X1.1(b)(2). The defendants were convicted of conspiracy to commit money laundering. The defendants raised a number of issues on appeal among which the district court's failure to apply a three-level conspiracy exception in §2X1.1(b)(2). More specifically, the defendants argued that under §2X1.1(b)(2) they were entitled to a three-level reduction in their sentence because they had not completed or were not close to completing all the acts they believed necessary for the completion of the money laundering scheme, especially with regard to the $6 million in future transactions. The Eleventh Circuit noted that the intended laundering of $6.7 million required an eight-level increase under §2S1.1(b)(2)(1). This offense level, however, had to be reduced by three levels because defendants had not completed or were not close to completing all the acts they believed necessary to laundering the $6 million in future transactions. Thus, the application of §2X1.1(b)(2) resulted in a five-level increase. In contrast, the actual laundering of §714,500 would have resulted in a four-level increase under §2S1.1(b)(2)(E). Hence, the five-level increase under §2X1.1(b)(2), the greater of the two offense levels, became the operative offense level for defendants. The court held that, as a proper application of the guidelines would result in a lower offense level for the defendants, the district court erred by not applying §2X1.1, and therefore the defendants' sentences were vacated and remanded.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999), *cert. denied*, 528 U.S. 1144 (2000). The district court did not err in imposing a vulnerable victim enhancement to the defendants' sentences for their conduct in a home invasion related to their convictions for conspiracy to possess with intent to distribute cocaine. The court first noted that although the enhancement typically applies to cases involving fraud, obstruction of justice or money laundering, the defendants' argument that the enhancement was improper in a drug conspiracy case was meritless. The court also recognized that a victim's elderly or youthful status, without more, is insufficient as a matter of law to justify a vulnerable victim enhancement. A court must look not only at the victim's individual vulnerability, but also at the totality of the circumstances, including the status of the victim and the nature of the crime. In this case, the goal of the home invasion was to confront a woman about the whereabouts of some missing drugs and money. Upon arriving at the home, however, the defendants threatened and intimidated the woman's 72-year-old aunt and her 11-year-old son. The district court found that the aunt and son had "unique vulnerabilities" due to their relationship with the intended target. The victims were selected in furtherance of the conspiracy and used in an effort to obtain information, drugs and money from the intended target.

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). The defendant argued that the district court erred by applying the vulnerable victim enhancement, per USSG §3A1.1(b), because the bank tellers in a bank robbery were vulnerable victims. The analysis focuses on the defendant's perception of the victim's vulnerability to the offense. Under *United States v. Morrill*, 984 F.2d 1136, 1138 (11th Cir. 1993), *en banc*, bank tellers are not automatically vulnerable victims by virtue of their position. The enhancement applies only where "a particular teller-victim possesses unique characteristics which make him or her more vulnerable or susceptible to robbery than ordinary bank robbery victims and thus make the particular bank robber more culpable than the ordinary perpetrator." *Id*. Here, the defendant selected the bank to rob because it was a rural bank with little law enforcement in the area. The enhancement thus applied.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The district court did not err in enhancing the defendant's base offense level pursuant to USSG §3A1.1, the vulnerable victim guideline. The defendant was convicted of conspiracy to commit mail and wire fraud, and wire fraud for fraudulent conduct while operating a loan brokerage firm. The defendant argued on appeal that the district court erred in applying USSG §3A1.1 because vulnerability for sentencing purposes is measured at the time of the commencement of the crime and the victim's vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court noted that the two circuits which have addressed this specific issue reached opposite conclusions. The Ninth Circuit held that USSG §3A1.1 does not require defendants to have targeted victims because of their vulnerability, and excludes only those whose vulnerability was not known to defendants. *United States v. O'Brien*, 50 F.3d 751, 754-55 (9th Cir. 1995). The First Circuit, however, held that §3A1.1 applies only to victims whom the defendant targeted because of their vulnerability. *United States v. Rowe*, 999 F.2d 14, 17 (1st Cir. 1993). The circuit court recognized that its own precedent is ambiguous on this issue. Compare *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991) ("Section 3A1.1 is intended to enhance the punishment for offenses where the defendant selects the victim due to the victim's perceived susceptibility to the offense") with *United States v. Salemi*, 26 F.3d 1084, 1088 (11th Cir.) (holding that crime involving a six-month-old baby automatically justified vulnerable victim enhancement even though defendant apparently did not select victim for that reason), *cert. denied*, 513 U.S. 1032 (1994). The circuit court ruled that under either interpretation, the enhancement was properly applied in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding "only that in cases where the `thrust of the wrongdoing' was continuing in nature, the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim."

§3A1.2 Official Victim[18]

See United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001), §2K2.1, p. 27.

§3A1.3 Vulnerable Victim

United States v. Hidalgo, 197 F.3d 1108 (11th Cir. 1999), *cert. denied*, 530 U.S. 1244 (2000). The district court did not err by enhancing the defendant's offense level for restraint of victim even though the victim was a co-conspirator. The co-conspirator was suspected of betraying the other defendants and was restrained by the defendants. The Eleventh Circuit held the sentence was properly enhanced because the guideline contemplates the restraint of any victim, co-conspirator or otherwise.

Part B Role in the Offense

[18]An amendment to become effective November 1, 2004, restructures §3A1.2 (Official Victim) and provides a two-tiered adjustment with a three-level adjustment for offenses motivated by the status of the official victim and a six-level adjustment if the defendant's offense guideline was from Chapter Two, Part A (Offenses Against a Person).

§3B1.1 Aggravating Role

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999), *cert. denied*, 533 U.S. 936 (2001). Supervision over the assets of a conspiracy is not enough to qualify a defendant for an aggravating role increase under §3B1.1 even though some of the Eleventh Circuit's prior opinions, such as *United States v. Carrillo*, 888 F.2d 117 (11th Cir. 1989), indicate that management of assets alone might serve as grounds for an increase under that provision. Note 2 of the commentary, however, explicitly declares that the provision applies only if the defendant was the organizer, leader, manager or supervisor of one or more participants. Assets management by itself is grounds for a departure, but not for a role-in-the-offense adjustment.

United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000), *cert. denied*, 534 U.S. 1043 (2001). The district court did not err in applying a two-level enhancement for defendant's role as a supervisor when he maintained control or influence over only one individual. The Eleventh Circuit found testimony that the defendant's girlfriend had to consult with him before she could agree to sell methamphetamine and taped telephone conversations indicating that the girlfriend would consult with the defendant who could be heard in the background was sufficient to support the enhancement.

United States v. Mesa, 247 F.3d 1165 (11th Cir.), *cert. denied*, 534 U.S. 912 (2001). The defendant's sentence had previously been vacated by the Eleventh Circuit and remanded for a more specific finding of fact on whether the defendant was an organizer or leader in the offense. On remand, the district court made a series of specific findings of fact to show that the defendant was an organizer or leader. On a second appeal, the defendant argued that the findings of fact were clearly erroneous because they were not supported by the record. The circuit court found the evidence presented in the PSR and in testimony supported a finding of fact that the defendant controlled and directed the acts of several people involved in the drug conspiracy, including at least three people who stored and delivered cocaine for him, others who unloaded and prepacked vehicles, and at least one interpreter who translated during drug transactions. Therefore, the district court did not err in finding that he acted as an organizer or leader and the enhancement was properly applied.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 55 (2003). To determine if the two-level enhancement for leadership role, pursuant to USSG §3B1.1(c) applies, the district court should consider, per Application Note 4, "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." Abundant evidence supported the enhancement here: the defendant did most of the planning and preparation for the bank robbery, including selecting the bank. The defendant first suggested the idea of a bank robbery, selected the bank, provided the guns, and agreed to "take care of the details." The defendant trained accomplices, diagramed the bank, and purchased a police scanner and monitored it from the getaway car during the robbery.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 70 (2003). A four-level enhancement for leadership role in drug conspiracy was proper because the defendant planned and organized hiding places, ordered co-conspirators, and was responsible for overseeing the distribution of drugs.

§3B1.2 Mitigating Role

United States v. Boyd, 291 F.3d 1274 (11th Cir. 2002). The defendant appealed the district court's refusal to reduce his sentence based on his minor role pursuant to USSG §3B1.2(b). The defendant contended that he should be a minor participant although he was held accountable only for his own conduct. Consistent with *United States v. Rodriguez-DeVaron*, 175 F.3d 930 (11th Cir.) (*en banc*), *cert. denied*, 528 U.S. 976 (1999) and Amendment 635 to the *Guidelines Manual* (now Application Note 3(A) to USSG §3B1.2), the district court properly analyzed the defendant's role in light of the relevant conduct for which he was held responsible and measured the defendant's role against the other participants in that relevant conduct. This analysis revealed the defendant's integral role in the offense and thus the district court did not err in denying the minor participant reduction.

United States v. Rodriguez-DeVaron, 175 F.3d 930 (11th Cir.) (*en banc*), *cert. denied*, 528 U.S. 976 (1999). Affirming the decision of the district court in denying the defendant's request for a minor role adjustment, a majority of the *en banc* Court of Appeals for the Eleventh Circuit announced the principles for determining whether a defendant qualifies for a "mitigating role" adjustment. The defendant was an alimentary canal smuggler who was caught with over 500 grams of high-purity heroin. At sentencing, she argued that she played a minor role and was, therefore, entitled to a downward adjustment of her offense level pursuant to USSG §3B1.2. The district court denied her request, noting that drug smuggling cannot take place at all without those who actually carry the contraband across borders, and that the amount attributed to the defendant was not a minor amount.

The Eleventh Circuit held that the first, and most important, assessment a sentencing court must make is whether the defendant played a minor or minimal role in the relevant conduct used to calculate the base offense level. The same conduct is used both to set the defendant's base offense level and as the chief determinant of the defendant's role in the offense. If the defendant's relevant conduct and actual conduct are identical, the defendant cannot prove entitlement to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable. The majority did, however, acknowledge some contrary decisions on this point from other circuits. *See United States v. Isaza-Zapata*, 148 F.3d 236 (3d Cir. 1998); *United States v. Demers*, 13 F.3d 1381 (9th Cir. 1994). The defendant's status as a courier does not alter this duty as courier status is not dispositive of whether the defendant played a minor role.

Secondarily, the sentencing court may measure the defendant's culpability in comparison to that of other participants in the relevant conduct. Not all participants may be relevant, the majority cautioned. The district court should consider only the conduct of persons who are identifiable or discernible from the evidence and who were involved in the relevant conduct attributable to the defendant. Additionally, the district court must determine that the defendant was less culpable than "most other participants" in an average, similar scheme, rather than just

less culpable than the other discernible participants in the present scheme, in order to be entitled to a minor role adjustment.

The court also held that a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled. With respect to this ruling, Amendment 635 to the guidelines expressly adopts the Eleventh Circuit's approach and incorporates it into USSG §3B1.2.

United States v. Ryan, 289 F.3d 1339 (11th Cir.), *cert. denied*, 537 U.S. 927 (2002). Reviewing for clear error, the court examined the district court's refusal to grant a minor role reduction, pursuant to USSG §3B1.2. The district court should conduct a two-prong analysis. First, the district court must assess whether a defendant's particular role was minor in relation to the relevant conduct attributed to him in calculating his base offense level. If the defendant meets the burden by a preponderance of the evidence, the district court must assess the defendant's culpability relative to other participants. Here, the defendant failed to establish that his role, as compared to the relevant conduct, was minor.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997). The district court erred imposing the abuse of trust enhancement on the defendant because any abuse of his position at the Housing Authority was unrelated to the offense for which he was convicted, tax evasion. The government contended that the district court was correct because absent the defendant's abuse of his position of trust, he could not have committed the offense for which he was convicted. In an issue of first impression, the circuit court phrased the required connection as between the abuse of the position of trust and the offense of conviction. The court reasoned that the sentencing guidelines themselves say that the defendant's abuse of trust must "significantly facilitate the commission or concealment of the offense." In this context, "offense" must be read as "offense of conviction" in order to maintain consistency with the definition of relevant conduct in §1B1.3(a).

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999), *cert. denied*, 532 U.S. 996 (2001). The district court did not err by applying an enhancement for "special skill" for a defendant who acted as the pilot in a conspiracy to import marijuana. The defendant contended that the two-level enhancement for "special skill" did not apply to a person who flies airplanes only as a hobby. The circuit court found the commentary defines "special skill" as "any skill not possessed by members of the general public" which "usually requires substantial education, training or licensing" and does not distinguish between professionals and amateurs.

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998), *cert. denied*, 526 U.S. 1029 (1999). The district court did not err in enhancing the defendant's sentence under §3B1.3 for use of a special skill where the defendants were convicted of altering or removing vehicle identification numbers from stolen automobile parts. The remote locations of the VINs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical skill. Dismantling cars—not to mention abandoning them, recovering the shells, and then

putting the cars back together—involves a combination of skills not possessed by the general public.

United States v. Foster, 155 F.3d 1329 (11th Cir. 1998). The district court did not err in applying a USSG §3B1.3 enhancement to Foster's sentence for use of a special skill where Foster possessed the skill of printing and used the skill to significantly facilitate the commission of his counterfeiting crime. Although printing does not require licensing or formal education, it is a unique technical skill that clearly requires special training such as setting up and calibrating the machinery and assisting in the operation of the printing machines. Foster had worked in a legitimate printing business for about a year and possessed such special skills which he used to facilitate the crime.

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). The district court erred in applying an enhancement for abuse of a position of trust where the defendant was convicted of Medicare fraud. The defendant, the owner and chief executive officer of a home healthcare provider, and her company did not report directly to Medicare but to a fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. Because of this removed relationship to Medicare, plus the intermediate review of the Medicare requests, the defendant was not directly in a position of trust in relation to Medicare.

United States v. Hall, 349 F.3d 1320 (11th Cir. 2003). The appellate court reversed and remanded the case for resentencing because the defendant did not occupy a position of trust under the guidelines. The defendant was convicted of mail fraud and money laundering conspiracy. On appeal, the defendant argued that the district court erred by enhancing his sentence under USSG §3B1.3 for abuse of position of trust due to his status as a pastor. The Eleventh Circuit noted that within the context of fraud it had found a position of trust to exist in two instances: 1) where the defendant stole from his employer, using his position in the company to facilitate the offense, and 2) where a fiduciary or personal trust relationship existed with other entities, and the defendant took advantage of the relationship to perpetrate or conceal the offense. The court noted that the instant case fell within the second situation, however, since the government did not allege the existence of a fiduciary relationship, to conclude that the defendant occupied a position of trust, it had to find a personal trust relationship between the defendant and the victims. The defendant's status as a pastor did not necessarily create a personal trust relationship between himself and the victims. With respect to the victims that the government presented, there was no personal trust relationship with the defendant so as to place him in a position of trust under the guidelines. Accordingly, the district court erred in applying a two-level enhancement under §3B1.3.

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust. While employed by the Red Cross, Harness was named director of Project Happen which was responsible for the distribution of HUD funds. This position gave Harness check signing authority over Project Happen's accounts. Harness used his position to illegally divert Project Happen's funds and used his position to conceal his and his codefendants' fraudulent activities.

United States v. Linville, 228 F.3d 1330 (11th Cir. 2000), *cert. denied*, 523 U.S. 996 (2001). The district court properly enhanced the defendant's base offense level for abuse of position of trust even though the employer who "footed the bill" for the bank fraud, and not the bank, conferred that position of trust. 228 F.3d at 1331. The defendant used his signature authority given by his employer, a car dealership, to forge checks which he converted to his personal use. The circuit court concluded an enhancement for abuse of a position of trust is appropriate whenever the defendant was in that position with respect to the victim of the crime. Since the employer was also a victim, the enhancement was properly applied.

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The court examined whether a physician occupies a position of trust in relation to Medicare, concluding that the physician is in such a position. The court then turned to the particular facts of this case, asking, does the physician abuse that position of trust when the physician receives kickbacks for patient referrals, where the referrals were medically necessary and the physician does not falsify patient records or submit fraudulent claims to Medicare? The court concluded that the abuse of trust enhancement applied.

United States v. Long, 122 F.3d 1360 (11th Cir. 1997). The district court erred in applying a USSG §3B1.3 enhancement for abuse of a position of trust. While employed as a food service foreman in the United States Penitentiary-Atlanta, defendant was arrested while attempting to carry 85.1 grams of cocaine into the prison. Long acknowledged that the Bureau of Prisons "trusted" him in the colloquial sense but argued that he did not occupy a "position of trust." The Government countered that Long occupied a position of trust because prison officials did not search him when he entered the prison. The circuit court held that Long did not occupy a "position of trust" as USSG §3B1.3 defines that term; the Government's reading would extend to virtually every employment situation because employers "trust" their employees; the guideline does not intend coverage this broad.

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002). Pursuant to USSG §3B1.3 and *United States v. Ward*, 222 F.3d 909, 911 (11th Cir. 2000), for the abuse of trust enhancement to apply, the government must establish both (1) that the defendant held a place of public or private trust, and (2) that the defendant abused that position in a way that significantly facilitated the commission or concealment of the offense. The defendant was represented to the victims by his co-conspirators as a professional trader and a licensed attorney. Based on the language and structure of the guidelines, the Eleventh Circuit ruled that the enhancement cannot apply based on the representations of others. Moreover, the defendant's status as an attorney does not necessarily mean he abused a position of trust; instead, it must be shown that the attorney-defendant occupied a particular position of trust in relation to the victims. The same fact-specific inquiry applies to financial advisors. More than discretion or control is required to justify the enhancement, per *United States v. Mullens*, 65 F.3d 1560, 1566 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). Here, the fiduciary or trustee relationship necessary for a trader to abuse a position of trust with investors was not present and thus the enhancement did not apply, requiring reversal of the district court's sentence.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001). The district court properly enhanced the defendant's sentence for violations of absentee

voter laws by one level for abuse of a position of trust where the defendant was a county deputy registrar. The fact that a codefendant who did not hold the same position of deputy registrar was convicted of the same offenses does not mean the defendant could not have significantly facilitated the commission of any of her offenses through her position. The Eleventh Circuit found the guideline does not require the position to be essential to a defendant's commission of the offense, only that the position facilitated this particular defendant's commission of it.

United States v. Ward, 222 F.3d 909 (11th Cir. 2000). The district court erred in applying the position of trust enhancement for an armed security guard who was not in a position of public or private trust. Agreeing with two other circuits who addressed this issue as it involved couriers and messengers, the circuit court held that because the security guard defendant had very little discretion in performing his duty and had no managerial authority, he was not in a position of trust sufficient to apply the enhancement. *See United States v. West*, 56 F.3d 216 (D.C. Cir. 1995); *United States v. Jankowski*, 194 F.3d 878 (8th Cir. 1999). Further, the court compared an armed security guard to a mail carrier, stating they both carry property belonging to others from one point to another. Because the responsibilities of the two positions are similar, yet employees of the postal service are specifically mentioned in the commentary as subject to the enhancement and armed security guards are not, the enhancement does not apply to this defendant as an armed security guard.

§3B1.4 Use of a Minor To Commit a Crime

United States v. McClain, 252 F.3d 1279 (11th Cir. 2001). The Eleventh Circuit held that USSG §3B1.4, which provides a two-level enhancement to a defendant's base offense level if he uses or attempts to use a minor in the commission of the crime, does not contain a scienter requirement. The circuit court further held that the enhancement could be applied to participants in any criminal enterprise in which the use of a minor was reasonably foreseeable, regardless of whether a given participant personally recruited or used the minor.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Banks, 347 F.3d 1266 (11th Cir. 2003). The district court erred in permitting an enhancement for obstruction of justice when it did not make a factual finding that the defendant's actions "actually resulted in a significant hindrance to the investigation or prosecution of the instant offense." USSG §3C1.1, comment. n.5(a). The defendant pled guilty to purchasing goods with credit cards issued to others, a violation of 18 U.S.C. § 1029. The defendant had given the police a false name upon arrest, a fact discovered after he bonded out. The PSR recommended a two-level sentence enhancement under §3C1.1, obstruction of justice, for providing materially false information to a law enforcement officer. The court adopted the PSR recommendation over the defendant's objection. The appeals court stated that adopting the PSR recommendation was not enough. A factual determination was needed to determine that the defendant's actions actually hindered the investigation and/or prosecution. It was not enough that the defendant intended to hinder, but that there had to be an actual obstructive effect before

the enhancement could be applied. The sentence was vacated and the case remanded for further fact finding and resentencing.

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The defendant appealed an obstruction of justice enhancement, pursuant to USSG §3C1.1, for threatening a witness where there was no finding that the threats were communicated to the witness. The issue was whether indirect threats made to third parties constitute obstruction absent a showing that they were communicated to the target. Recognizing a circuit split, the court held that indirect threats can warrant the enhancement where, as here, a United States Marshal testified that other inmates informed him that the defendant had made threats against him and another inmate, both of whom were witnesses against the defendant.

United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000), *cert. granted on other grounds and judgment vacated by*, 531 U.S. 1062, *aff'd*, 251 F.3d 160, *cert. denied*, 534 U.S. 823 (2001). The district court did not err in applying an enhancement for obstruction of justice in a conviction for conspiracy to distribute marijuana and carrying a firearm in connection with the conspiracy where the defendant acknowledged that after he murdered his drug supplier, he asked his secretary to go to his apartment to remove money, cocaine and other physical evidence. The defendant argued he did not obstruct justice because there was no federal investigation underway and that he was not a hindrance because the investigation had abundant evidence from other sources. The circuit court found there is no requirement that the obstructive act occur subsequent to a formal commencement of an investigation before the enhancement can be applied.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The defendant was convicted of telephone fraud in which he used local and long distance service providers to allow third-parties to make foreign calls, for which he collected a fee, and then he would relocate without paying the telephone service providers. The defendant challenged a perjury-based obstruction of justice enhancement, pursuant to USSG §3C1.1. For purposes of this enhancement, the Supreme Court has defined perjury as "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). Here, the district court made the requisite specific factual findings necessary to support the obstruction of justice enhancement. Those facts arose from the defendant's testimony at the sentencing hearing, specifically his denial of a Kuwaiti connection to his telephone scheme, his denial of placing telephone calls himself, and his denial of using names and social security numbers on his "customer list" in order to fraudulently obtain telephone service with local and long distance providers. The district court determined that the defendant lied in these particulars and the Eleventh Circuit held that this finding was not clearly erroneous.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001). The district court properly enhanced codefendant's offense level for obstruction of justice by influencing an affiant to testify falsely and to identify material facts about which affiant testified falsely and for which codefendant was responsible. The circuit court found that the codefendant did not request more specific findings of fact by the district court, and it was too

late to complain in circuit court. Further, the circuit court found that detailed findings were not necessary.

United States v. Uscinski, 369 F.3d 1243 (11th Cir. 2004). The court of appeals affirmed the district court's decision to apply a two-level enhancement for obstruction of justice under §3C1.1 when the defendant lied about his connection to a tax evasion scheme. The defendant contended that his acts did not obstruct justice and that the imposition of the enhancement amounts to impermissible double counting because his false statements were part of his offense of tax evasion. The court of appeals found that the defendant did obstruct justice because his actions were more than a mere denial of guilt. His statements caused the government to have to take the unusual step of having foreign governments trace bank accounts to determine the location of the money. Secondly, the enhancement was not double counting because his false statements were not part of the tax evasion scheme. The scheme was complete and the taxes were filed before the false statements were made to the government. The guideline for tax evasion §2T1.1 does not take into account his statements because they are not part of the offense. The enhancement does not amount to double counting, and the sentence is affirmed.

United States v. Zlatogur, 271 F.3d 1025 (11th Cir.), *cert. denied*, 535 U.S. 946 (2002). At the sentencing hearing, an agent testified regarding threats made by the defendant to an unindicted co-conspirator. On that basis, the district court applied the two-level obstruction of justice enhancement, pursuant to USSG §3C1.1. The Eleventh Circuit affirmed, ruling that the enhancement could be based on hearsay testimony, as long as it was sufficiently reliable.

§3C1.2 Reckless Endangerment During Flight

United States v. Cook, 181 F.3d 1232 (11th Cir. 1999). The two defendants before the court took part in a three-man robbery of a credit union. Soon after an unmarked police vehicle took up pursuit of the trio, the defendants exited their car. The third participant proceeded to drive at a high rate of speed until he collided with a police vehicle. The district court ruled that the chase was a reasonably foreseeable consequence of their conspiracy to rob the credit union and that the defendants could therefore be held accountable for it under USSG §3C1.2. Application Note 5 to USSG §3C1.2 states, however, that a defendant is responsible for another's conduct only if he "aided or abetted, counseled, commanded, induced, procured or willfully caused" it. This language, according to the Eleventh Circuit, operates as an exception to the general rule of reasonable foreseeability in USSG §1B1.3. To hold otherwise would transform USSG §3C1.2 from a factually specific enhancement to a standard that would become universally applicable to virtually everyone whose co-conspirators fled from law enforcement immediately following the commission of a crime resulting in a substantial risk of death or serious bodily injury to another person.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The defendant appealed the district court's refusal to group his two counts of escape convictions under USSG §3D1.2. Reviewing with due deference, the court noted that §3D1.2 provides four bases for grouping counts, but that the defendant did not specify on which grounds he relied. The court reviewed each basis and concluded that the district court did not err in declining to group the counts.

United States v. Hersh, 297 F. 3d 1233 (11th Cir. 2002), *cert. denied*, 537 U.S. 1217 (2003). The district court erred in treating as eight separate sentencing guidelines groups one count of conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors since only a single act of conspiracy was alleged against the defendant.

United States v. McIntosh, 216 F.3d 1251 (11th Cir.), *reh'g and reh'g en banc denied*, 232 F.3d 217 (2000). The district court did not err in refusing to group the defendant's multiple counts on interstate transportation of child pornography by computer. The defendant distributed many pictures involving different children, and his distribution victimized each child separately. The circuit court found this precluded a grouping of the counts on the ground that the counts involved the "same victim and same act or transaction." The defendant argued his offense behavior was ongoing or continuous. He further argued that USSG §2G2.2 was written to cover his behavior and, under USSG §3D1.2, his offenses should be grouped. However, the Eleventh Circuit found USSG §2G2.2 is not specifically included or excluded under USSG §3D1.2, but that fact is irrelevant because the defendant's behavior in trafficking in material relating to the sexual abuse of children is specifically excluded from the definition of "sexual abuse" under USSG §2G2.2.

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). In a matter of first impression, the Eleventh Circuit ruled that the district court did not err in grouping money laundering offenses (§2S1.1) with fraud offenses (§2F1.1) pursuant to USSG §3D1.2 in order to calculate the defendant's base offense level. The defendant pled guilty to wire fraud, mail fraud and money laundering related to the operation of a "Ponzi" scheme. Section 3D1.2 provides that "counts involving substantially the same harm shall be grouped `when the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm.'" The circuit court recognized that the purpose of USSG §3D1.2 is "to combine offenses involving closely related counts." *See United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992). The circuit court ruled that the fraud and money laundering counts were related to the same general type of offense because both were integral to the success of the defendant's "Ponzi" scheme. The circuit court recognized that without the fraud, the defendant would have not had funds to launder and ruled that the district court had properly grouped the counts pursuant to USSG §3D1.2. Reflecting this approach, guideline Amendment 634 included an application note expressly providing instructions regarding the grouping of money laundering counts with a count of conviction for the underlying offense.

United States v. Tillmon, 195 F.3d 640 (11th Cir. 1999).[19] The defendant appealed the district court's refusal to group his three counts of transportation of child pornography for the purposes of sentencing and argued that the counts should have been grouped because the victim portrayed in the pictures was the same victim and was not "identifiable" as discussed in the Application Note 2 to §3D1.2. Reviewing the district court's refusal with due deference, the Eleventh Circuit, consistent with a majority of circuits, rejected the defendant's argument distinguishing between the victim of child pornography and the victim of the dissemination of the images. The court determined that the victims identified were the children portrayed in each of the three transmissions at issue, and that victimization was not diminished by the fact that the actual names of the minor victims were not known. It further held that the district court did not err in finding that the first three counts involved different victims and as such affirmed the district court's refusal to group those counts.

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003). The appellate court affirmed the district court's division of the defendant's conspiracy count into three separate groups under §3D1.1 based on three distinct victims. The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count of using and carrying a firearm during and in relation to a federal crime of violence. At sentencing, the district court divided the defendant's offense into three groups pursuant to §§1B1.2(d) and 3D1.2 based on the three victims. Group one related to the abduction of Christine, a mother, and ultimately featured an offense level of 36. The second and third group pertained to Alceau and Alexander, two children, and featured final adjusted offense levels of 34 and 32 respectively. The district court took the highest of these levels, 36, and added three additional levels to reflect the three victims. However, this upward adjustment was offset by a three-level reduction pursuant to §3E1.1(a) and (b)(1) for acceptance of responsibility. On appeal, the defendant argued that the district court erred by dividing his offenses into three distinct groups based on three victims pursuant to §§1B1.2(d) and 3D1.2. The Eleventh Circuit stated that in order to determine whether the district court properly divided the defendant's conspiracy conviction into separate offenses, the court had to decide whether a conspiracy to take several hostages is a conspiracy to commit several substantive offenses within the meaning of comment. n.8 to §3D1.2. The court noted that where a conspiracy involved multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into the same number of distinct crimes for sentencing purposes. Accordingly, the district court did not err in dividing defendant's conspiracy count into three separate groups under §3D1.2 based on three distinct victims.

Part E Acceptance of Responsibility

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[19]In 2001, the Commission addressed the circuit conflict regarding whether multiple counts of possession, receipt, or transportation of images continuing child pornography should be grouped together pursuant to subsection (a)(or (b) of §3D1.2 (Groups of Closely Related Counts). Resolution of the conflict depended in part on determining who is the victim of the offense: the child depicted in the pornography images or society as a whole. The Eleventh Circuit, in *Tillmon*, held that the child depicted is the victim and therefore the counts are not grouped. Effective November 1, 2001, the Commission adopted a position for grouping of multiple counts of child pornography distribution, receipt, and possession, pursuant to §3D1.2(d). *See* USSG App. C, Amendment 615.

§3E1.1 Acceptance of Responsibility[20]

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997). The district court did not err in allowing only a two-level reduction for the defendant's acceptance of responsibility, as his guilty plea on the last count was not timely. The court of appeals reasoned that when there are multiple counts of conviction, adjustment for acceptance of responsibility is applied after all the offenses have been aggregated pursuant to USSG §1B1.1. To be entitled to an adjustment, a defendant must accept responsibility for each crime to which he is being sentenced; otherwise, a defendant would receive a benefit on his offense for both robberies even though he accepted responsibility for only one robbery.

United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000), *cert. granted on other grounds and judgment vacated by*, 531 U.S. 1062, *aff'd*, 251 F.3d 160, *cert. denied*, 534 U.S. 823 (2001). It was not an error for the district court to find the defendant had failed to show an acceptance of responsibility for his offense that would warrant a reduction under the guidelines. The Eleventh Circuit held a guilty plea falls far short of showing acceptance of responsibility in circumstances where the defendant actively avoided responsibility by destroying evidence, hiding out in Canada, frivolously denying overwhelming identification evidence and frivolously claiming in Canada that he was subject to a federal death penalty for charges of conspiracy to distribute marijuana and carrying a firearm in connection with the conspiracy, in order to avoid extradition.

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997). The sentencing court did not have the discretion to apply less than the three-level decrease for acceptance of responsibility and cooperation under USSG §3E1.1(a) and (b). Once the defendant qualifies for the decrease, the three-level decrease is mandated. The appellate court held that the sentencing guidelines provide for a two-level reduction in a defendant's base offense level for acceptance of responsibility, plus an additional one-level reduction provided the defendant's cooperation was timely. Except for an attempted escape, the appellate court determined that the defendant fully qualified for the three-level reduction. The only issue was whether the defendant actually intended to escape, and whether the reduction for acceptance of responsibility should be taken away because of that activity. According to the appellate court, the court has yet to determine whether the third-point reduction under USSG §3E1.1(b) can be withheld for reasons unrelated to the timeliness of the cooperation. Relying on decisions by other circuits, the appellate court reasoned that obstructionist conduct following the guilty plea was irrelevant to whether the defendant was entitled to a one-level reduction provided under USSG §3E1.1(b), *e.g.*, *United States v. Talladino*, 38 F.3d 1255, 1263-64 (1st Cir. 1994). The court held that the language of the guideline was absolute on its face and simply did not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements were satisfied.

[20]Effective April 30, 2003, Congress, in the PROTECT Act, Pub. L. 108-21, amended this guideline by amending the criteria for the additional one level and incorporating language requiring a government motion.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The district court's determination of acceptance of responsibility is reviewed for clear error. Its "determination that a defendant is not entitled to acceptance of responsibility will not be set aside unless the facts in the record clearly establish that a defendant has accepted personal responsibility." *United States v. Sawyer*, 180 F.3d 1319, 1323 (11th Cir. 1999), *cert. denied*, 528 U.S. 1126 (2000). Because the district court determined that the defendant committed perjury at his sentencing hearing and that he only admitted to a minor part of his crimes, the district court properly refused acceptance of responsibility credit.

United States v. Smith, 127 F.3d 987 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998). The district court did not err in considering the nature of the challenges to the presentence report in determining whether the defendant should receive a reduction for acceptance of responsibility. In his objections to the PSR, the defendant contended that he did not possess fraudulent intent with respect to both offense conduct and relevant conduct. These objections were factual, not legal, and amounted to a denial of factual guilt.

United States v. Starks, 157 F.3d 833 (11th Cir. 1998). The district court did not err in refusing to grant defendant a reduction for acceptance of responsibility where defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility. Siegel contended that he was entitled to the reduction because he admitted all the relevant facts and cooperated with the government's investigation, while preserving his legitimate legal position regarding the applicability of the statute to his conduct. The court recognized that a defendant may, in rare situations, be entitled to a reduction for acceptance of responsibility even if he goes to trial to assert and preserve issues unrelated to factual guilt, such as the applicability of a statute to his conduct. A defendant who contends that he did not possess fraudulent intent, however, is making a factual, not a legal, challenge to the government's criminal allegations that precludes an acceptance reduction. Here, the defendant denied having any fraudulent intent, an essential element of the charges on which he was convicted, thus putting the government to its burden of proof. The defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility.

United States v. Thomas, 242 F.3d 1028 (11th Cir.), *cert. denied*, 533 U.S. 960 (2001). A defendant who pled guilty to unlawful possession of firearms by a convicted felon was not entitled to a two-level reduction in his offense level for acceptance of responsibility when he forced the government to go to trial on two counts of possession with intent to distribute crack cocaine. The Eleventh Circuit agreed with other circuits which have addressed this and similar issues, and found when a defendant indicted on multiple counts goes to trial on any of those counts and is therefore unwilling to accept responsibility for some of the charges, he has not really "come clean" or faced up to the full measure of his criminal culpability and is entitled to nothing under USSG §3E1.1. *See United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989) (downward adjustment is made only after all counts are combined and no adjustment is available where defendant obstructed justice as to one of the three counts to which he pled guilty); *United States v. Kleinebreil*, 966 F.2d 945 (5th Cir. 1992) (defendant not entitled to reduction where he only accepted responsibility for two of the three counts); *United States v. Chambers*, 195 F.3d 274 (6th Cir. 1999) (defendant not entitled to reduction where he stipulated to only one of the

three counts of which he was convicted); *United States v. Ginn*, 87 F.3d 367 (9th Cir. 1996) (defendant not entitled to reduction when he does not accept responsibility for all the counts of which he is charged).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Coeur, 196 F.3d 1344 (11th Cir. 1999). The district court did not err in applying §4A1.1 because the defendant committed the crime of being found in the United States after having been deported while he was serving another sentence, and not when he re-entered the United States. The defendant was found by INS in the United States while he was serving a sentence for possession of cocaine and resisting an officer. Because he was in jail on the date he committed the offense of being found in the country, the two point increase in his criminal history score was proper.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The district court correctly applied one criminal history point under §4A1.1 for defendant's conviction for driving with a suspended license and possessing marijuana, both misdemeanors, even though he was unrepresented by counsel when he pled guilty to those charges. The Eleventh Circuit agreed with the district court that the conviction was not "presumptively invalid" and was therefore properly considered in the sentencing proceeding. The burden was on the defendant to lay a factual foundation for collateral review on the grounds that the state conviction was presumptively invalid, which he did not do.

§4A1.2 Definitions and Instruction for Criminal History

United States v. Bankston, 121 F.3d 1411 (11th Cir. 1997), *cert. denied*, 522 U.S. 1067 (1998). The district court did not err in concluding that a prior felony conviction based on a plea of guilty but mentally ill (GBMI), pursuant to Georgia law, can be used as predicate offense to establish career offender status under sentencing guidelines. The court of appeals examined Georgia law and found that a conviction based on the GBMI plea has the same force and legal effect as a conviction established by a plea of guilty and is therefore is a "guilty plea" within the meaning of §4A1.2(a)(4) of the guidelines.

Castillo v. United States, 200 F.3d 735 (11th Cir.), *cert. denied*, 531 U.S. 845 (2000). The district court correctly refused to recalculate the defendant's criminal history points after his prior state conviction had been reversed and subsequently *nolle prossed*. The circuit court held that although the guidelines state that sentences which result from convictions that have been reversed, vacated, or ruled unconstitutionally invalid are not to be counted pursuant to USSG §4A1.2, the defendant's state court conviction was reversed in a ruling adverse to the defendant, and was not based on his innocence. Therefore, the defendant's prior conviction fell under the section of the guideline which states that convictions set aside "for reasons unrelated to innocence or errors of law" are to be counted.

United States v. Gass, 109 F.3d 677 (11th Cir. 1997). As a matter of first impression, the district court properly relied on the defendant's prior juvenile conviction and sentence to increase the defendant's criminal history score. The defendant argued that he should not have been assessed an additional three criminal history points for several prior bank robbery convictions because the Federal Youth Corrections Act (FYCA) set aside and "expunged" the convictions pursuant to §4A1.2(j). The circuit court rejected the defendant's argument and affirmed the previous holding in *United States v. Doe*, 747 F.2d 1358 (11th Cir. 1984), in which the Eleventh Circuit held that section 5021(a) of the FYCA did not entitle a defendant to have a conviction record expunged or destroyed. Additionally, the circuit court refused to find that section 5021(a)'s "set aside" provision was synonymous with §4A1.2(j)'s "expungement" reference. Moreover, the majority of circuits have similarly construed section 5021 of the FYCA and its relationship to the sentencing statute.

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998). The district court erred in counting the defendant's 1986 six-month sentence to a community treatment center as a "sentence of imprisonment" under §4A1.1(b). In a case of first impression, the circuit court followed the Ninth Circuit in *United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1993), in concluding that a term of confinement in a community treatment center, like residency in a halfway house, is not a sentence of imprisonment.

United States v. Shazier, 179 F.3d 1317 (11th Cir. 1999). The district court did not err in determining the defendant's criminal history score by assessing two points, instead of one, for a prior state court drug conviction for which the defendant had received a state pardon. The defendant served six months' imprisonment for cocaine possession in Louisiana and a term of probation. After his probation expired, the defendant received a first-offender pardon from the state. The district court added two points to the defendant's criminal history, pursuant to USSG §4A1.1(b), for the six month sentence. The defendant argued that the state pardon for this offense amounted to a "diversionary disposition" under USSG §4A1.2(f) for which only one point should have been added to his criminal history. The Eleventh Circuit held that the "diversionary disposition" provision of the guidelines only applies to sentences not already counted in determining criminal history, and does not remove from consideration such sentences that are required to be counted. Since there is no indication in the guidelines that pardoned convictions are to be counted any differently than non-pardoned convictions and the six-month sentence was required to be counted under USSG §4A1.1(b), the district court was correct in assessing the two points for the pardoned conviction.

United States v. White, 335 F.3d 1314 (11th Cir. 2003). The district court erred when it applied §4A1.2 and held that the false information conviction arose from "separate conduct." Following his arrest, the defendant was investigated by the INS for illegal re-entry into the United States. The defendant gave a false name to an officer, and later pled guilty to giving the police false information. At his sentencing hearing, the defendant objected to the assessment of two criminal history points for the false-information conviction, arguing that the conduct underlying his conviction was part of the instant 8 U.S.C. § 1326 offense, and that the two additional criminal history points should not be assigned. The district court ruled against the defendant and concluded that the false-information conviction arose from "separate conduct" under §4A1.2. On appeal, the defendant argued that the district court erred in assessing two

criminal history points for his false information sentence because giving false information to the police was part of the instant federal offense. First, the Eleventh Circuit noted that under §4A1.2, conduct which is part of the instant offense means conduct that is relevant conduct to the instant offense under §1B1.3. *See* USSG §4A1.2 comment. (n.1). Under §1B1.3, "relevant conduct" includes, *inter alia* "all acts and omissions committed...by the defendant that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense...". *See* USSG §1B1.3(a)(1). With regards to the instant case, the court noted that the district court's explanation for ruling that the offenses were unrelated was merely a chronology of what happened. The court stated that these observations did not allow it to make any inferences about defendant's intent, which was the relevant inquiry in deciding whether the state false-information crime was an attempt to avoid detection for the federal crime. The court was convinced by the defendant's argument. Had the defendant given his true identity, his crime of being illegally in the United States would have been discovered, not only by local officers but also by the INS agents responsible for enforcing 8 U.S.C. § 1326. In other words, the fact that the defendant initially refused to give his real name to the INS agents was strong evidence that he gave a false name to avoid detection for violating federal immigration laws. Consequently, the district court erred when it applied §4A1.2 and held that the false information conviction arose from separate conduct.

§4A1.3 Adequacy of Criminal History

United States v. Dixon, 71 F.3d 380 (11th Cir. 1995). In an issue of first impression, the circuit court joined with the Second, Fifth, and Sixth Circuits, to hold that sentencing courts need not make step-by-step findings en route to the ultimate sentencing range when the court, pursuant to USSG §4A1.3 departs above Criminal History Category VI. *See United States v. Daughenbaugh*, 49 F.3d 171, 174-75 (5th Cir.), *cert. denied*, 516 U.S. 900 (1995); *United States v. Thomas*, 24 F.3d 829, 834-36 (6th Cir.), *cert. denied*, 513 U.S. 976 (1994); *United States v. Harris*, 13 F.3d 555, 558-59 (2d Cir. 1994). The district court, pursuant to USSG §4A1.3, upwardly departed three levels (from 30 to 33). The defendant contended that the district court erred in upwardly departing three levels without first explicitly considering whether the ranges corresponding to the offense levels one and two levels higher than the original offense level would have been appropriate. The defendant argued that the 1992 amendment to USSG §4A1.3 (policy statement) requires sentencing courts to follow the same procedure for upwardly departing from a criminal history category above category VI as below category VI, including the requirement to discuss each category it passes over en route to the category that adequately reflects the defendant's past criminal conduct. *See United States v. Williams*, 989 F.2d 1137, 1142 (11th Cir. 1993); *United States v. Johnson*, 934 F.2d 1237, 1239-40 (11th Cir. 1991). As amended in 1992, USSG §4A1.3 states that a court upwardly departing from category VI "should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." The circuit court concluded that because the guidelines provide no objective criteria for determining how far down the offense level axis the sentencing court need travel in order to reflect accurately the defendant's criminal history above category VI, the sentencing court must have discretion to determine the offense level that will correspond to the appropriate sentencing range for a given defendant. The circuit court concluded that sentencing courts need

not make step-by-step findings en route to the ultimate sentencing range, rather, criminal history departures above category VI will be reviewed for reasonableness, based on findings as to why an upward departure is warranted and why the particular sentencing range chosen is appropriate.

United States v. Hernandez, 160 F.3d 661 (11th Cir. 1998). The defendant was convicted of concealing assets after seeking bankruptcy relief for himself and his two businesses. As one basis for an upward departure, the district judge cited the defendant's failure to abide by an administrative settlement agreement arising out of claims that he failed to pay his employees minimum wage and overtime in violation of the Fair Labor Standards Act. Section 4A1.3 specifically authorizes a sentencing judge to consider an upward departure when the criminal history category understates the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. Section 4A1.3(c) provides that a sentencing court may rely on prior similar misconduct established by a civil adjudication or by failure to comply with an administrative order in determining whether a departure is warranted. Here, the Eleventh Circuit rejected the defendant's contention that "similar misconduct" must be criminal misconduct and held that the sentencing court did not abuse its discretion by concluding that the misconduct underlying the violation of the administrative settlement agreement was fraudulent in nature making it similar to the fraudulent conduct underlying the offense of conviction.

United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). In the defendant's tax evasion case, the district court erred by upwardly departing from Criminal History Category I to Criminal History Category III, based on criminal conduct that constituted relevant conduct already considered by the district court in calculating the defendant's base offense level. However, the district court decided that while the 1988 prior conviction must be excluded from determining the criminal history category (CHC), it could be considered for the purposes of departing from the guidelines under §4A1.3. *Id.* at 1285. Because the district court felt that Criminal History Category I understated the seriousness of the defendant's criminal history, it departed across the guidelines to Criminal History Category III. *Id.* On appeal, the defendant challenged this criminal history departure on the grounds that the conduct involved in the prior conviction was part of the "relevant conduct" of the instant offense. The court held that "when a district court determines that the conduct underlying a conviction is relevant conduct to the instant offense, and considers it as a factor in calculating the base offense level, it cannot then be simultaneously considered as a "prior sentence" under §4A1.3. *Id.* at 1286.

United States v. Jones, 289 F.3d 1260 (11th Cir.), *cert. denied*, 537 U.S. 1049 (2002). The defendant appealed an upward departure based upon the failure of his criminal history category to adequately reflect the seriousness of his past criminal conduct and the likelihood of recidivism. Reviewing uncounted juvenile adjudications, the Eleventh Circuit ruled that the district court did not abuse its discretion in considering the defendant's juvenile record to determine that upward departure was warranted.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in departing upward on the defendant's offense level because the criminal history category of VI did not adequately reflect the seriousness of his criminal history. The defendant had a total of 40 criminal history points, 27 more than necessary to put him in category VI.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court relied upon over-represented criminal history to justify a six-level vertical downward departure. The district court departed vertically because USSG §4B1.1 mandates that a career offender shall be Category VI without regard to the seriousness of the prior offenses. The Eleventh Circuit reversed. Criminal history departures are governed by USSG §4A1.3, not the general departure guideline, 5K2.0. Section 4A1.3 departures must be on the horizontal axis, reflecting the offender's criminal history category, and not on the vertical axis. The facts did not support the finding that the defendant's criminal history significantly over-represented the seriousness of the defendant's record.

See United States v. Webb, 139 F.3d 1390 (11th Cir. 1998), §4B1.1, p. 60, *infra*.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Duty, 302 F.3d 1240 (11th Cir. 2002). The district court did not err in sentencing the defendant as a career offender. The defendant had four prior felony drug convictions for which he entered guilty pleas in state court. He argued on appeal that the four prior convictions should be treated as one conviction pursuant to a Georgia statute, O.C.G.A. §17-10-7(d), which requires that "conviction of two or more crimes charged on separate counts of one indictment or two or more incidents be consolidated for trial." The court determined that since the proper definition of "conviction" as used in §4B1.1 was governed by the federal and not state law, the Georgia statute did not apply to the defendant's sentence. Further, under §4A1.2, Note 3, since the defendant's prior state drug offenses were separated by intervening arrests, they were unrelated for sentencing purposes and thus should be treated as separate prior convictions for career offender purposes.

United States v. Gay, 251 F.3d 950 (11th Cir. 2001). Agreeing with the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits, the Eleventh Circuit found that a state conviction for prior felony escape was properly treated as a crime of violence under section 4B1.2 for career offender purposes, even though the escape involved simply walking away from a non-secure facility. An escape conviction is an offense that does involve conduct that presents potential risk of physical injury to another because "even the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the escapee." (*Quoting United States v. Nation*, 243 F.3d 467 (8th Cir. 2000)). *See also United States v. Dickerson*, 77 F.3d 774 (4th Cir.), *cert. denied*, 519 U.S. 843 (1996); *United States v. Ruiz*, 180 F.3d 675 (5th Cir. 1999); *United States v. Harris*, 165 F.3d 1062 (6th Cir. 1999); *United States v. Mitchell*, 113 F.3d 1528 (10th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998).

United States v. Gilbert, 138 F.3d 1371 (11th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999). The district court did not err in sentencing the defendant as a career offender after finding that carrying a concealed firearm in violation of Florida law is a predicate "crime of violence." The court of appeals held that carrying a concealed weapon "presents a serious potential risk of physical injury" under §4B1.2(1).

United States v. Gonsalves, 121 F.3d 1416 (11th Cir. 1997), *cert. denied*, 522 U.S. 1067 (1998). The district court did not err in sentencing the defendants as career offenders based on prior state convictions. The defendants argue that the Commission went beyond the statutory authority in 28 U.S.C. § 994(h) by including state court convictions in this guideline. The court of appeals followed five other circuits in holding that §4B1.1 does not exceed its statutory authority by including state court convictions in addition to federal convictions as permissible predicate offenses for career offender enhancement. *See United States v. Brown*, 23 F.3d 839 (4th Cir. 1994); *United States v. Consuegra*, 22 F.3d 788, 790 (8th Cir. 1994); *United States v. Beasley*, 12 F.3d 280 (1st Cir. 1993); *United States v. Rivera*, 996 F.2d 993, 995-97 (9th Cir. 1993); *United States v. Whyte*, 892 F.2d 1170, 1174 (3d Cir. 1989), *cert. denied*, 494 U.S. 1070 (1990). If Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to "offenses described in"—not "convictions obtained under"—those statutes.

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998), *cert. denied*, 528 U.S. 1130 (2000). The district court erred in using arrest affidavits to determine whether the defendant's state conviction was for a "controlled substance offense" necessary for the career offender enhancement. The defendant asserted that, because the prior offenses were under a Florida statute that made both the sale or purchase of narcotics a crime, his state court convictions may have been merely for the purchase of narcotics and as such would not qualify as controlled substance offenses under the guidelines. Nor did the judgments in the cases indicate whether the convictions were for sale or purchase. To resolve the ambiguity in the statute and judgements, the district court reviewed the police arrest affidavits underlying the convictions and determined that the defendant was arrested for the sale of narcotics. The court of appeals agreed with the defendant, noting that the focus of the inquiry must be upon the conduct of which the defendant was convicted, not the conduct for which he was arrested. It was unclear what exactly the defendant pled to; the inquiry in resolving the ambiguity of the 1993 convictions should be limited to examining easily produced and evaluated court documents, such as any helpful plea agreements or transcripts, any presentence reports adopted by the sentencing judge, and any findings made by the sentencing judge.

United States v. Jackson, 199 F.3d 1279 (11th Cir.), *cert. denied*, 529 U.S. 1120 (2000). The district court did not err in finding defendant's prior offense of possession of a fire bomb with intent to willfully damage any structure or property as defined by state statute was a crime of violence under USSG §4B1.2 for career offender purposes because the offense entailed conduct that "presents a serious potential risk of physical injury to another." The defendant argued the crime was not a crime of violence because it did not involve any threat to another person. The circuit court agreed the crime fit the definition because even if the structure or property were uninhabited, there was inherent risk to firefighters and innocent bystanders if the fire spread to occupied structures.

United States v. Jeter, 329 F.3d 1229 (11th Cir. 2003). On appeal, the defendant argued that, pursuant to the rule of lenity, the district court should have granted him a minor role adjustment under §4B1.1. The Eleventh Circuit noted that the rule of lenity did not apply. The court held that minor role adjustments were not available to defendants under §4B1.1. *See also United States v. Morales-Diaz,* 925 F.2d 535, 540 (1st Cir. 1991) (mitigating role reductions do

not apply to career offenders); *United States v. Ward,* 144 F.3d 1024, 1036 (7th Cir. 1998) (absent express authorization, "role in the offense" adjustments do not apply to career offender offense levels); *United States v. Beltran,* 122 F.3d 1156, 1160 (8th Cir. 1997) (mitigating role adjustments "simply do not apply in the career offender context"); *United States v. McCoy,* 23 F.3d 216, 218 (9th Cir. 1994) (allowance of minor role adjustments would conflict with Congress' desire for maximum sentence).

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The rule that criminal history downward departures are limited to horizontal departures applies to career offender defendants. *See United States v. Webb*, 139 F.3d 1390, 1395 (11th Cir. 1998); *United States v. Gilbert*, 138 F.3d 1371, 73 (11th Cir. 1998).

United States v. Webb, 139 F.3d 1390 (11th Cir. 1998). The district court erred in concluding that it lacked the authority to grant a downward departure with respect to a defendant classified as a career offender. The court of appeals held that §4A1.3, which authorizes an upward or downward departure when the criminal history category does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendant's classification as a career offender overstates the seriousness of his criminal history.

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Gunn, 369 F.3d 1229 (11th Cir. 2004). The defendant challenged his classification as a career offender under §4B1.2(a)(2) because the district court interpreted attempted burglary as a "crime of violence." Section 4B1.2(a)(2) defines burglary as a crime of violence and the defendant argues that this is different from attempted burglary. The court of appeals ruled that an uncompleted burglary does not diminish the potential risk of physical injury and upheld the classification of the defendant as a career offender. The defendant's conviction and sentence was vacated on alternate grounds.

United States v. Spell, 44 F.3d 936 (11th Cir. 1995). The district court erred in determining that the defendant's prior state burglary conviction was a "crime of violence" under the career offender guidelines by relying on the charging documents behind the conviction without first determining whether the defendant pled guilty to crimes charged. The defendant argued that his prior Florida burglary conviction did not constitute a "crime of violence" because the state court's judgment was for the "burglary of a structure" under Florida's burglary statute. Because the judgment did not specify that the structure was a dwelling, and because burglaries which do not involve dwellings or occupied structures are not "crimes of violence" under *United States v. Smith*, 10 F.3d 724, 730 (10th Cir. 1993), the defendant claimed that this conviction was not technically a "crime of violence." Furthermore, the defendant claimed that Supreme Court and Eleventh Circuit precedent establish that a district court may not look behind a conviction to the charging document to determine whether a conviction constitutes a crime of violence. *Taylor v. United States*, 495 U.S. 575, 601-603 (1990), *cert. denied*, 502 U.S. 888 (1991); *United States v. Wright*, 968 F.2d 1167, 1172 (11th Cir. 1992), *vacated on other grounds*, 508 U.S. 902 (1993); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991). Rather, the district court must take a "categorical

approach" and look no farther than the judgment of conviction. The circuit court disagreed, concluding that Application Note 2 to USSG §4B1.2 rejects the categorical approach of these cases, which were decided under a previous version of the guidelines, and permits examination of the charging document if "ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself." *Smith*, 10 F.3d at 733. In this case, the charging documents charged the defendant with burglary of a dwelling, and thus the district court had ruled that the defendant's prior conviction was indeed a "crime of violence." The circuit court held, however, that the district court's analysis was improper because it relied on conduct contained in the charging document without first determining whether the defendant was convicted for the charged offense. Because USSG §4B1.2 specifies that "the conduct of which the defendant was convicted is the focus of inquiry," the district court should have established that the crime charged was the same crime for which the defendant was convicted, and then establish whether the offense of conviction was actually a "crime of violence." On remand, the district court should examine the defendant's plea in the state case.

§4B1.4 Armed Career Criminal

United States v. Cobia, 41 F.3d 1473 (11th Cir.), *cert. denied*, 514 U.S. 1121 (1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e) even though the government did not affirmatively seek such an enhancement. The defendant contended that the government must affirmatively seek the enhancement for a court to apply section 924(e). He argued that the commentary to §4B1.4, which sets forth the procedure for imposing a section 924(e) enhancement, specifies that the application of the enhancement is governed by the practice in the jurisdiction where the defendant is sentenced. Because it had been the practice in the district where the defendant was sentenced for the prosecution to affirmatively seek a section 924(e) enhancement, the defendant claimed that the application of section 924(e) was not mandatory. The circuit court, addressing an issue of first impression, rejected this argument and held that the plain language of section 924(e) establishes that the enhancement is mandatory. The circuit court joined the First and Tenth Circuits in holding that upon reasonable notice to the defendant and an opportunity to be heard, the section 924(e) enhancement should automatically be applied by courts to qualifying defendants regardless of whether the government affirmatively seeks such an enhancement. *See United States v. Johnson*, 973 F.2d 857, 860 (10th Cir. 1992); *United States v. Craveiro*, 907 F.2d 260, 263 (1st Cir.), *cert. denied*, 498 U.S. 1015 (1990).

United States v. Gilley, 43 F.3d 1440 (11th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The district court erred in allowing the defendant to collaterally attack four of the five predicate state convictions to preclude their use for enhancement under the Armed Career Criminal Act and in determining his criminal history score pursuant to USSG §4A1.2. The defendant was convicted of possession of a firearm by a convicted felon. The government appealed the district court's failure to sentence the defendant in accordance with the mandatory requirements of the Armed Career Criminal Act. The appellate court ruled that the Supreme Court's decision in *Custis v. United States*, 511 U.S. 485 (1994), was dispositive of this issue. *Custis* precludes collateral attack on prior convictions that are counted for sentencing purposes under 18 U.S.C. § 924(e)(1), "with the sole exception of convictions obtained in violation of the rights of counsel." The sentence was vacated and remanded for resentencing.

McCarthy v. United States, 135 F.3d 754 (11th Cir.), *cert. denied*, 525 U.S. 1009 (1998). The district court did not err in finding that the defendant's prior Florida drug convictions qualified as predicate "serious drug offenses" under 18 U.S.C. § 924(e), so as to subject him to a mandatory minimum as an Armed Career Criminal. The defendant argued that, to determine whether his prior convictions were serious drug offenses, the court should have used the Florida guidelines' presumptive sentence range for each of the prior convictions, which was between three and one-half and four and one-half years, instead of the statutory maximum penalties. The court of appeals rejected the argument, finding that the district court properly considered the statutory maximum penalties.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in setting the defendant's base offense level at 34 under the Armed Career Criminal provision, §4B1.4(b)(3)(A), even though the defendant had not actually been convicted of a crime of violence while he possessed the firearms. The defendant did not contest that he committed the aggravated assault and armed burglary and that those were crimes of violence, but argued that because he had not been convicted of the offenses, they should not be considered in sentencing him. The court of appeals rejected this argument, agreeing instead with the Sixth and First Circuits, which have held that as long as the government proves by a preponderance of the evidence that a crime of violence was committed in connection with the firearms possession, §4B1.4(b)(3)(A) applies regardless of whether the connected crimes led to a conviction. *See United States v. Rutledge*, 33 F.3d 671, 673-74 (6th Cir. 1994), *cert. denied*, 513 U.S. 1193 (1995); *United States v. Gary*, 74 F.3d 304, 316 (1st Cir.), *cert. denied*, 518 U.S. 1026 (1996). The court reasoned that the guideline states that 34 is the proper offense level "if the defendant used or possessed the firearm . . . in connection with a crime of violence"; the language does not mention a conviction.

United States v. Rucker, 171 F.3d 1359 (11th Cir.), *cert. denied*, 528 U.S. 976 (1999). The defendant, charged with various drug offenses, had state convictions which both the government and defendant agreed qualified as predicates under the Armed Career Criminal statute, 18 U.S.C. § 924(e). The district court, deeming the defendant to be just a small-time street dealer, concluded that the convictions were very minor and, on that basis, departed downward by three criminal history categories. On appeal, the Eleventh Circuit held that the district court erred in looking behind the drug convictions that qualified as "serious drug offense[s]" under the armed career criminal statute and concluding that the offenses were so minor as to justify a downward departure. Relying on prior Eleventh Circuit precedent in *United States v. Gonzales-Lopez*, 911 F.2d 542 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991), the court found that it would make no sense to conclude that although a sentencing court may not look behind the fact of an unambiguous judgment in determining whether a prior conviction serves as a predicate serious drug offense placing the defendant within the ACC guideline, it may do so to conclude a downward departure is warranted.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Acosta, 287 F.3d 1034 (11th Cir.), *cert. denied*, 537 U.S. 926 (2002). The district court did not err in finding that the defendant was not entitled to "safety valve" relief. There was no error in the district court's conclusion that the defendant did not satisfy his burden or persuasion to convince the court that he had provided truthful and complete information.

United States v. Anderson, 200 F.3d 1344 (11th Cir. 2000). The district court correctly found the safety valve provision inapplicable to a defendant convicted for possession with intent to distribute crack cocaine within 1,000 feet of a public elementary school, even though the conviction included a violation of a possession statute to which the safety valve provision applied. The defendant pled guilty to violating 18 U.S.C. § 860, which necessarily includes a violation of section 841(a) or section 856. He argued that even though section 860 does not trigger the safety valve, because he was also convicted under section 841, he was entitled to application of the provision. The circuit court held because the provision only applies to five statutes and does not include section 860, a defendant convicted and sentenced under this section is not eligible for application of the provision.

United States v. Bravo, 203 F.3d 778 (11th Cir.), *cert. denied*, 531 U.S. 994 (2000). On his first appeal, the defendant claimed the district court erred by concluding that it lacked authority to depart from the guidelines or to apply the safety valve provision of USSG §5C1.2. The defendant had been convicted of conspiracy to import cocaine, and subsequent to his incarceration, Congress amended USSG §2D1.1 and enacted USSG §5C1.2. Upon rehearing, the sentencing court granted him the benefit of the USSG §2D1.1 amendment, but did not apply the safety valve provision because it was not included in the list of amendments which may be applied retroactively under USSG §1B1.10(c). The safety valve provision only applies where application of the guideline would result in imposition of a sentence lower than the statutory minimum of ten years. Because the defendant's revised sentence after application of the USSG §2D1.1 amendment was 168 months, the circuit court found whether the district court had jurisdiction to apply the safety valve provision was irrelevant.

United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000). The district court erred in finding that the defendant's prior failure to truthfully disclose information related to his offenses precluded application of the safety valve provision. The Eleventh Circuit stated that USSG §5C1.2 provides only one deadline for compliance and nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from relief. Therefore, a defendant's lies and omissions will not, as a matter of law, disqualify him from safety valve relief so long as he makes a complete and truthful proffer no later than the commencement of the sentencing hearing. The court remanded the case for a determination by the district court on the factual question of whether the defendant's final proffer was complete and truthful.

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999). The defendant was part of a drug conspiracy. He worked at one of three marijuana grow houses and was subject to a five-year mandatory minimum sentence, under 18 U.S.C. § 841(b)(1)(B)(vii), on the basis of the amount of marijuana involved in the conspiracy. His base offense level was enhanced pursuant to USSG §2D1.1(b)(1) on the basis of a co-conspirator's possession of a firearm at one of the

other grow houses. Despite the enhancement, his guidelines sentence would still have been below the statutory mandatory minimum. The sentencing judge held that the application of the USSG §2D1.1(b)(1) firearm enhancement precluded the application of the "safety valve" provision to the defendant because he could not satisfy the no-firearms requirement of USSG §5C1.2. The Eleventh Circuit disagreed and held "possession" of a firearm for purposes of the safety valve provision does not include the reasonably foreseeable possession of a firearm by a co-conspirator that is sufficient to trigger the USSG §2D1.1(b)(1) enhancement. First, Application Note 4 to USSG §5C1.2 specifically limits the defendant's accountability to his or her own actions and conduct that the defendant aided or induced. Second, if "possession" in USSG §5C1.2 encompassed constructive possession by a co-conspirator, the safety valve provision's "induce another participant to [possess]" would be unnecessary.

United States v. Figueroa, 199 F.3d 1281 (11th Cir. 2000). The district court improperly applied the safety valve provision for a defendant who did not make a complete and truthful disclosure of her knowledge of the crime. The circuit court stated the district court made statements clearly indicating it was not prepared to accept everything in the defendant's statement and that it found her disclosures incomplete and untruthful but applied the provision because "it apparently considered absence of knowledge on . . . critical points the government [wa]s interested in enough to apply the safety valve." However, the guideline does not permit a sentencing court to make any determination of the possible utility of the information possessed by the defendant.

United States v. Orozco, 121 F.3d 628 (11th Cir. 1997). The district court did not err in sentencing the defendant to the statutory minimum without applying the safety valve. When the defendant has more than one criminal history point, the safety valve is unavailable, even though the defendant's criminal history category is Category I.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998). The district court erred in ordering judicial deportation as a condition of supervised release. The defendant's case was pending at the time the court of appeals decided *United States v. Romeo*, *infra*, in which the court held that the newly enacted immigration provision, 8 U.S.C. § 1229(a), eliminated the authority of the district courts to independently order deportation. The defendant's failure to object to the district court's lack of subject matter jurisdiction to order her deportation could not waive the issue, because subject matter jurisdiction is never waived.

United States v. Okoko, 365 F.3d 962 (11th Cir. 2004). The district court erred in tolling the term of supervised release period while the defendant was legally outside of the country. The defendant was convicted of conspiracy to commit access device fraud, a violation of 18 U.S.C. § 1029(a)(1)-(3), (b)(2), and sentenced to imprisonment of time served and three years' supervised release. The court provided in its Probation Order that if the defendant was deported, the supervised release period would toll and if he re-entered the United States, the term of supervised release would resume. Four years later, the defendant was arrested for credit card fraud and additionally charged by the court with violating his term of supervised release. The defendant argued that the term of supervised release expired three years from the date of conviction and thus the district court did not have jurisdiction. Congress authorizes the tolling of a period of supervised release in two circumstances in 18 U.S.C. § 3624(e): when the person is in prison for another crime, and for a violation of a supervised release before it expires. Congress did not include the period of time when the probationer is outside the country as a circumstance for tolling a period of supervised release. As a result, the district court did not have the authority to order the tolling of the term of supervised release and therefore did not have jurisdiction to find the defendant violated his supervised release.

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997). The district court erred in requiring the defendant's deportation as a condition of supervised release. The court of appeals held that 8 U.S.C. § 1229(a), the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), eliminated the district court's jurisdiction to order judicial deportation pursuant to 18 U.S.C. § 3583(d). Previously, in *United States v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (*en banc*), *cert. denied*, 520 U.S. 1121 (1997), the court had held that section 3583(d) authorized a district court to order the deportation of a defendant "subject to deportation" as a condition of supervised release. The IIRAIRA provides, however, that a hearing before an immigration judge is the exclusive procedure for determining whether an alien may be deported. In the wake of the statutory change, the court of appeals held that section 3583(d) authorizes a district court to order that a defendant be surrendered to the INS for deportation proceedings in accordance with the Immigration and Naturalization Act, but it does not authorize a court to order a defendant deported. Moreover, the court held that the statutory change is applicable to all pending cases.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997). The district court's order of restitution was improper in light of the court's acknowledgment that the defendant was indigent and not capable of making restitution in the full amount. The defendant was directed to pay restitution in the amount of $357,281. In determining whether to order restitution and the amount, the sentencing court should consider the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, and the financial needs and earning ability of the defendant and the defendants' dependants. Examination of the transcript from the sentencing court revealed that both the prosecutor and the defense attorney agreed that the defendant was indigent and could not pay restitution at the time of sentencing. The defense counsel argued that defendant's lack of job skills rendered him unlikely to be able to make full restitution during his period of supervised release. The government argued that the defendant's crimes showed that he possessed significant mechanical skills that would help him earn a legitimate living and pay restitution following his release. The appellate court held that although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, it may not order restitution in an amount that the defendant can never repay. The appellate court held that the district court abused its discretion in ignoring the testimony concerning the defendant's financial resources and the defendant's ability to pay after release.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 522 U.S. 953 (1997). The district court did not err in voiding the defendant's restitution order because the defendant committed suicide prior to his incarceration. In keeping with Eleventh Circuit precedent, the court adhered to the general rule that the death of a defendant during the pendency of his direct appeal renders both his conviction and sentence, including any restitution order, *void ab initio*. *United States v. Schumann*, 861 F.2d 1234, 1236 (11th Cir. 1988). The interests of justice require that when death precludes the resolution of an appeal taken by the court, an accused not remain convicted without resolution of the merits of the appeal. The application of this rule to restitution is premised on the assumption that restitution is penal rather than compensatory in nature, despite the fact that a restitution order resembles a judgement for the benefit of the victim. Upholding the restitution order in this case would create a statutory discrepancy, because a restitution order requires an underlying conviction, while the doctrine of abatement *ab initio* returns a defendant to the position of never having been convicted.

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997). The district court erred in imposing restitution based on conduct of which the defendant was acquitted. The defendant was convicted of possessing a firearm in a federal facility and acquitted of the charge of assault with intent to commit murder, based on the shooting of a man he allegedly shot in self-defense. However, the district court ordered the defendant to pay restitution to cover medical costs of the individual he shot. The government contends that this is permissible based on the fact that sentencing judges may consider relevant conduct, even if the defendant is not found guilty beyond a reasonable doubt of that conduct. Relying on *Hughey v. United States*, 495 U.S. 411 (1990), the circuit court rejected this argument. In *Hughey*, the Supreme Court held that, pursuant to the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3579-3580, restitution

orders cannot consider harms arising from conduct for which the defendant was acquitted. This is based on the statute's intent to punish only for the crime of conviction. A restitution order cannot be based on charges of which the defendant was acquitted, even if the charges relate to the crime of conviction. As the defendant was merely convicted of possessing the firearm, he cannot be held responsible for costs related to the shooting itself. The circuit court also rejected the Government's reliance on cases holding that a sentencing court may consider acquitted conduct stating that such cases are based on a sentencing court's powers, rather than the issue in this situation of the VWPA's scope as to authority to impose restitution.

§5E1.2 Fines for Individual Defendants

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996). The district court erred in ordering that if the defendant served his full prison sentence, his fine would be waived. On appeal, the court held that the sentencing guidelines, with limited exceptions, require the imposition of a fine in all cases. The court noted that there is no exception in the guidelines for the expiration of a fine based on the defendant's service of his full term of incarceration. As a result, the court of appeals could find no support for the district court's decision.

United States v. Price, 65 F.3d 903 (11th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). In a matter of first impression, the Eleventh Circuit held that USSG §5E1.2, which imposes fines to pay for incarceration costs, is rationally related to the Sentencing Reform Act. The circuit court joined the Fifth Circuit in holding that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a rational means to assist the victims of crime collectively." *United States v. Hagmann*, 950 F.2d. 175, 187 (5th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992). The defendants argued on appeal that the fines imposed pursuant to USSG §5E1.2 were excessive, violating the Eighth Amendment and due process under the Fifth Amendment because they were not rationally related to the purposes of the Sentencing Reform Act. Every circuit that has addressed the issue has adopted the Fifth Circuit's rationale in *Hagmann*. *See United States v. Zakhor*, 58 F.3d 464, 466 (9th Cir. 1995) (upholding cost of confinement fines); *United States v. May*, 52 F.3d 885, 891 (10th Cir. 1995) (finding guideline rationally related to legitimate government interest); *United States v. Leonard*, 37 F.3d 32, 39 (2d Cir. 1994) (citing *Hagmann* and holding §5E1.2(i) consistent with 18 U.S.C. § 3553(a); *United States v. Turner*, 998 F.2d 534, 538 (7th Cir.) (holding that §5E1.2(I) is authorized by statute), *cert. denied*, 510 U.S. 1026 (1993). The Eleventh Circuit rejected the constitutional challenges and joined the majority of circuits in upholding §5E1.2(i).

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Clark, 274 F.3d 1325 (11th Cir. 2001). Pursuant to statute, the defendant was subject to a mandatory minimum sentence of 20 years. The guideline sentencing range was calculated to be 168-210 months. The district court imposed a 150-month sentence. The Eleventh Circuit reversed, finding plain error. As USSG §5G1.1(c)(2) provides, "[w]here a

statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."

Tramel v. United States Parole Commission, 100 F.3d 129 (11th Cir. 1996). The United States Parole Commission did not err in using the applicable guidelines range, rather than the lower foreign sentence, as the baseline from which a downward departure would apply. After conviction in the Commonwealth of the Bahamas for possession of a dangerous drug with intent to supply, the defendant was sentenced to four years' imprisonment. The defendant was transferred to the United States to serve his sentence pursuant to the Convention on the Transfer of Sentenced Persons, Council of Europe. The Parole Commission, which had jurisdiction under 18 U.S.C. § 4106A(b)(1)(A) to determine the appropriate release date and period of supervised release, determined that the defendant's entire four-year foreign sentence should be served, followed by supervised release for six months. This determination was made by viewing the defendant as if he had been convicted in a United States district court of a "similar offense" subject to the sentencing guidelines. The defendant's guideline range under the sentencing guidelines was determined to be 87 to 108 months, but, due to the harsh prison conditions endured by the defendant in the Bahamas, the parole examiner determined that a downward departure from that range was warranted. However, the examiner rejected the defendant's request for a release prior to completion of the 48-month foreign sentence, finding that the lower foreign sentence was an adequate departure for the torture endured in the Bahamas. In situations in which the applicable guidelines range exceeds the foreign imposed sentence, the Commission is not required to ignore the guidelines range when determining whether a downward departure is warranted. Compare *Thorpe v. United States Parole Commission*, 902 F.2d 291 (5th Cir.) (upholding refusal to release prior to completion of foreign sentence, despite abuse in foreign prison), *cert. denied*, 498 U.S. 868 (1990), with *Trevino-Casares v. United States Parole Commission*, 992 F.2d 1068 (10th Cir. 1993) (ordering release prior to expiration of entire foreign sentence). While the Commission acknowledged that abuse at the hands of foreign officials is an appropriate basis for a downward departure, the circuit court found that the facts of the present case did not justify such a departure. The Parole Commission looked to USSG §5G1.1, which states: "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." "In the end, a foreign sentence does not under USSG §5G1.1(a) displace the applicable guideline range; it is the sentence required by the guidelines, but not a substitute for the guideline range itself."

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Davis, 329 F.3d 1250 (11th Cir.), *cert. denied*, 124 S. Ct. 330 (2003). The district court interpreted §5G1.2(d) to require that defendants' sentences to run consecutively rather than concurrently so that the appropriate guidelines range could be achieved. On appeal, the defendants argued that the sentencing guidelines required the court to impose a concurrent sentence where the total punishment imposed on the 21 U.S.C. § 841 count was less than or equal to the highest statutory maximum. *See* USSG §5G1.2(c). The defendants contended that sentencing courts were authorized to exercise alternative sentencing configurations to avoid manifest injustice and prejudice to the defendants. The Eleventh Circuit noted that it had never directly addressed the issue of whether a district court retains the

discretion to sentence a defendant to concurrent terms of imprisonment when §5G1.2(d) calls for consecutive terms of imprisonment. The court joined the majority of its sister circuits and held that the imposition of consecutive sentences under §5G1.2(d) was mandatory. *See United States v. Diaz,* 296 F.3d 680, 684-85 (8th Cir.), *cert. denied,* 537 U.S. 940 (2002); *United States v. Price*, 265 F.3d 1097, 1109 (10th Cir. 2001), *cert. denied,* 535 U.S. 1099 (2002); *United States v. Kentz,* 251 F.3d 835, 842 (9th Cir. 2001), *cert. denied,* 535 U.S. 933 (2002); *United States v. Angle,* 254 F.3d 514, 518-19 (4th Cir.), *cert. denied,* 534 U.S. 937 (2001); *United States v. Page,* 232 F.3d 536, 544-45 (6th Cir. 2000).

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The Eleventh Circuit did not find reversible error where the district court refused to run a new sentence for an escape conviction concurrent with the sentence imposed for a prior conviction for another escape. The court determined that neither USSG §5G1.3(a) or (b) applied. Thus, the district court had discretion to impose a consecutive sentence to achieve reasonable punishment, pursuant to USSG §5G1.3(c).

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001). The Eleventh Circuit found the government did not violate the defendant's due process rights when it did not file a motion to depart based on substantial assistance. Although the government conceded that the defendant had provided substantial assistance by participating in controlled drug buys and testifying against his supplier who was ultimately convicted, he was arrested for possession with intent to distribute cocaine base after testifying against his supplier. The defendant argued that the government could not refuse to file a USSG §5K1.1 motion for "reasons other than the nature of [his] substantial assistance," relying on the Eighth Circuit's decision in *United States v. Anzalone*, 148 F.3d 940 (8th Cir. 1998). The Eleventh Circuit disavowed the Eighth Circuit's approach and instead limited its review of the government's refusal to file a USSG §5K1.1 motion to claims of unconstitutional motive, as directed by *Wade v. United States*, 504 U.S. 181 (1992) (government cannot exercise its power to file a USSG §5K1.1 motion for an unconstitutional motive).

§5K1.2 Refusal to Assist (Policy Statement)

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). The court stated that USSG §5K1.2 prohibits upward departures based on the refusal to cooperate. Such refusal, however, can be considered when determining the sentence within the applicable guideline range.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the Government's cross-appeal, the appellate court held that the defendant's responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimer's and Parkinson's diseases were not so extraordinary as to warrant a downward departure from the guidelines under USSG §5K2.0. The district court's five-level downward departure resulted in defendant being sentenced to one hour of imprisonment followed by 36 months of supervised release, instead of the guideline sentence of 12 to 18 months' imprisonment. The appellate court agreed with the government that although the defendant's situation was difficult, the imposition of a prison sentence normally disrupts family relationships. *See United States v. Mogel*, 956 F.2d 1555 (11th Cir.), *cert. denied*, 506 U.S. 857 (1992) (rejecting downward departure where defendant had two minor children to support and a mother living with her). The appellate court noted that the sentence imposed must be within the guidelines range unless "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." As stated in USSG §5H1.6, the Commission concluded that family circumstances do not ordinarily justify a downward departure. The appellate court acknowledged the district court's unique "feel for the case," but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997). The district court erred in departing downward based on the defendant's civil forfeiture and his loss of his license to practice medicine. The defendant's agreement in plea bargain not to contest the government's subsequent civil forfeiture action seeking $50,000 from the defendant as proceeds of his illegal drug activities was a prohibited factor that could not be the basis for downward departure under the sentencing guidelines. The defendant's loss of his privilege to practice medicine as part of the plea agreement was not a basis for downward departure when sentencing him for federal drug offenses, where defendant received a two-level sentence enhancement for using his special skills as a physician to facilitate commission of his crimes and for abusing the position of trust he held as a physician, and was able to commit his offenses because he had prescription writing authority.

United States v. Holland, 22 F.3d 1040 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). The district court's *sua sponte* downward departure was in error. The defendant appealed from a civil judgement entered for his participation in a conspiracy to deprive certain individuals of their civil rights in violation of 42 U.S.C. § 1985. He filed perjured in *forma pauperis* papers, claiming that he did not own anything of value. He was subsequently indicted and convicted of several counts of criminal perjury. The district court departed downward *sua sponte* because it determined that USSG §2J1.3 should not apply since the defendant's perjury stemmed from a civil proceeding. The circuit court held that the perjury statute, 18 U.S.C. § 1621, does not distinguish between perjury committed during civil or criminal proceedings. Accordingly, the defendant's offense conduct did not fall outside of the heartland of typical perjury offenses.

United States v. Kapelushnik, 306 F.3d 1090 (11th Cir. 2002). The district court granted a downward departure to the defendant due to the defendants' post-adjudication voluntary restitution of stolen coins. In examining the evidence of record the court concluded that there

was no evidence to support that the defendants were responsible either directly or indirectly for the return of stolen coins; therefore, a downward departure was not warranted.

United States v. Miller, 78 F.3d 507 (11th Cir. 1996). The district court did not make sufficient factual findings in granting the defendant a downward departure, and therefore, the sentence was vacated and remanded. The district court granted the defendant a seven-level downward departure on the grounds that the Commission failed to adequately consider the impact of USSG §2S1.2(a) upon an attorney who derives knowledge of the source of the criminally derived property through a legitimate attorney-client relationship. *See* USSG §5K2.0. The government asserts that the defendant's status is taken into account through USSG §3B1.3 and, therefore, is adequately considered by the Commission. The defendant's argument rests on an exemption phrase amended into 18 U.S.C. § 1957(f)(1) stating "[T]he term `monetary transaction' . . . does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." As this amendment was never reflected in USSG §2S1.2, the appellant asserts that the Commission did not consider the effect that knowledge obtained via the attorney-client relationship can have on sentencing. The circuit court vacated the sentence due to the insufficient factual findings supporting the departure and remanded with instructions for the district court to explicitly make factual findings as to the circumstances warranting a departure, to state whether these circumstances are considered by the guidelines and are consistent with the guidelines goals, and if a departure is deemed appropriate, to state reasons justifying the extent of the departure.

United States v. Miller, 71 F.3d 813 (11th Cir.), *cert. denied*, 519 U.S. 842 (1996). The district court improperly departed downward by sentencing the defendant for conspiring to possess powder cocaine rather than crack, which was the substance delivered and charged in the indictment. The defendant argued that he was "trapped into supplying crack." The circuit court stated that the district court made no findings, and a careful review of the record does not reveal any mitigating circumstances justifying downward departure under §5K2.0. Furthermore, the court rejected the defendant's entrapment argument and noted that sentencing entrapment is a defunct doctrine. *See United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992), *cert. denied*, 517 U.S. 1157 (1996); *United States v. Markovic*, 911 F.2d 613, 616 (11th Cir. 1990). The circuit court concluded that departure from the recommended sentencing range was neither reasonable nor consistent with the guidelines.

United States v. Saucedo-Patino, 358 F.3d 790 (11th Cir. 2004). The appellate court reversed the district court's eight-level downward departure. Following his deportation from the country after being convicted on a felony charge of burglary in a habitation with intent to commit aggravated assault, the defendant reentered the United States without authorization, only to be caught. At sentencing, the district court granted the defendant an eight-level downward departure under §5K2.0. The government appealed. First, the Eleventh Circuit noted that section 401(d) of the PROTECT Act merely changed who within the federal judiciary made a particular decision, not the legal standards for that decision. The court stated that applying section 401(d) of the PROTECT Act retroactively did not violate the *Ex Post Facto* Clause. Accordingly, the standard of review was *de novo*. The issues on appeal were whether the district court possessed authority to depart downward eight or more levels based on the nature of the underlying offense; whether the defendant's employment history and family responsibilities

were outside the heartland, and whether the defendant's motive for reentering the country was relevant to the determination to depart. First, the court noted that, regardless of the circumstances, a sentencing court lacks the authority to treat a crime of violence as if it were not, in fact, a crime of violence. In other words, a sentencing court was categorically prohibited from departing downward eight or more levels where its only basis for doing so was the nature of the underlying offense. The court then noted that the guidelines expressly stated that employment history and family responsibilities were not usually relevant in determining whether a sentence should fall outside the usual guideline range. In the instant case, there was no specific aspect of defendant's employment history or family responsibilities that was so exceptional as to take this case outside the heartland. Finally, the defendant's argument that his motive for reentering the United States–supporting his family–did not involve an intent to commit further crimes and that it was appropriate for the district court to take this motive into account was without merit. The court noted that the defendant's motive for reentering was irrelevant. All that maters in the instant case was that defendant entered without permission after being convicted of a felony. The court concluded that neither of the factors used by the district court in formulating its downward departure could serve as a basis for a departure. Accordingly, the district court's eight-level downward departure was not justified by the facts of the case.

United States v. Searcy, 132 F.3d 1421 (11th Cir. 1998). The district court did not err in refusing to depart to reflect the theoretical sentence the defendant might have received had prosecution occurred in state court. The circuit court reasoned that allowing departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure, as federal sentences would be dependent on the practice of the state within which the federal court sits.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). Under USSG §5K2.0, a combination of factors, taken together, may take a case outside the heartland, thus warranting departure. Here, however, each of the factors identified by the district court to justify its downward departure were impermissible grounds for departure under §5K2.0. Therefore, these impermissible factors cannot combine to warrant a departure.

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). The district court erred in granting a three-level downward departure for "cultural differences." The defendant, a Japanese national, was convicted of illegally importing turtles and snakes. He moved for a departure, alleging that because of the cultural differences between the United States and Japan, he was unaware of the serious consequences of his actions, and that these differences constituted a factor not taken considered by the Sentencing Commission. In Japan, the animals were common, not endangered, and defendant would not have been arrested in Japan for keeping the animals. The court of appeals found these grounds insufficient to take the case out of the heartland. The fact that the animals may or may not be endangered is already considered in the guideline. By definition, imported wildlife comes from other countries. The guidelines that apply to illegal importation of wildlife necessarily contemplate that a portion of illegally imported wildlife will be imported by people from other countries, many of whom will have an imperfect understanding of United States customs law.

United States v. Willis, 139 F.3d 811 (11th Cir. 1998). The district court erred in departing downward in order to reconcile the disparity between federal and state sentences among codefendants. The court of appeals noted that permitting departure based on a codefendant's sentence in state court would create system-wide disparities among federal sentences.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The district court erred in departing upward based on the consequential financial damages to the victims beyond the amount they paid in advance fees to the defendant. The defendant was convicted of conspiracy to commit mail and wire fraud and wire fraud stemming from the operation of a loan brokerage firm. The defendants argued on appeal that consequential damages should not have been used as a basis for upward departure because those damages were adequately considered in establishing the defendant's guideline range. The circuit court agreed, ruling that the Sentencing Commission had expressly considered and rejected consequential damages as a factor in determining offense levels under the guidelines, except for government procurement and product substitution cases. The court noted that if the consequential damages in this case were "substantially in excess" of what ordinarily is involved in an advance fee scheme case, then a departure may have been warranted. The circuit court ruled that the consequential damages in this case were not substantially in excess of the typical fraud case and were not so "outside the heartland" for the crime of fraud as to warrant an upward departure.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Regueiro, 240 F.3d 1321 (11th Cir. 2001). The district court did not err in departing upward four levels when it concluded that the nature and scope of the defendant's conduct significantly disrupted the government's provision of Medicare benefits. The defendant pled guilty to conspiracy to defraud the United States, conspiracy to commit money laundering, and money laundering. The value of the laundered funds totaled over three million dollars. The Eleventh Circuit found the defendant's conduct disrupted governmental function because every time one of the nurses from the 100 groups he organized fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide care to eligible patients.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995). The district court erred in granting a downward departure under USSG §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens. On appeal, the government argued that 26 U.S.C. § 5861 seeks to prevent the harms associated with the defendant's conduct and that the defendant's subjective views of foreign policy may not serve as a basis for a sentence reduction. The appellate court agreed that section 5861 was intended to reach the harms connected with the defendant's conduct, and that the downward departure was inappropriate. The appellate court noted that the defendant's conduct did not fall into the "traditional" departure categories for USSG §5K2.11: hunting, sport

shooting and protecting the home. The circuit court further ruled that the sentencing guidelines clearly indicate that a defendant is not entitled to a downward departure because of a personal belief that the criminal action is furthering a greater political good.

§5K2.13 Diminished Capacity (Policy Statement)[21]

United States v. Miller, 146 F.3d 1281 (11th Cir. 1998), *cert. denied*, 525 U.S. 1127 (1999). The district court erred in departing downward for diminished mental capacity based on the defendant's impulse control disorder. The defendant pled guilty to transporting through a commercial computer service images depicting child pornography. He argued he was not a pedophile, but that he used the images of children in barter to get pornographic images he was interested in and that he had an impulse control disorder that contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, the facts of the case did not remove it from the heartland in that, just because defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which defendant was guilty. Second, according to the expert testimony presented, impulse control disorders are not unusual among those who collect child pornography, so this aspect of defendant's personality does not separate him from other defendants. Finally, USSG §5K1.13 requires that the diminished capacity be linked to the commission of the offense. It appeared that, at most, the defendant's impulse disorder was related to his viewing of adult pornography, and that his offense conduct was no more related to the impulse disorder than if he had robbed someone in order to use the proceeds to purchase adult pornography. The testimony failed to link the disorder to the offense, so no USSG §5K2.13 departure was appropriate.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court departed downward based, in part, because it believed the defendant's judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and early treatment for an emotional or mental disorder. The Eleventh Circuit reversed, explaining that these grounds are prohibited by USSG §5H2.13 in all but extraordinary cases concluding that there is nothing in the record about the defendant's drug addiction or mental and emotional condition that makes this case so extraordinary that it is outside the heartland. Moreover, §5K2.13 requires "significantly reduced" mental capacity to warrant such departure, and no such facts were in the record.

[21]Effective April 30, 2003, Congress, under the PROTECT Act, Pub. L. 108-21, added language prohibiting departures for aberrant behavior in certain crimes involving child crimes and sexual offenses. *See* USSG App. C, Amendment 649.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001). The district court erred in imposing a condition of supervised release ordering the defendant not to seek relief from a deportation proceeding. The Eleventh Circuit held the district court lacked the authority to impose such a restriction because the Immigration Reform and Immigrant Responsibility Act divests the federal courts of jurisdiction in criminal proceedings to order deportation independently. Because preventing the defendant from raising a defense or challenging the government's case during a removal hearing would have much the same effect, the imposed condition was not proper.

United States v. Hurtado-Gonzalez, 74 F.3d 1147 (11th Cir.), *cert. denied*, 517 U.S. 1250 (1996). In considering an issue of first impression, the circuit court joined the Second Circuit in holding that in cases where the defendant's original sentence was for a preguidelines offense, the sentencing guidelines do not apply to sentencing following revocation of probation. *See United States v. Vogel*, 54 F.3d 49, 51 (2d Cir. 1995). The Second Circuit held that the plain language of 18 U.S.C. § 3565(a), which governs revocations of probation, controlled. The pertinent statutory language states that the court "may revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing." The defendant contended that this reasoning should not be applied because the guidelines goal of sentencing uniformity is better achieved by sentencing under the guidelines. The court rejected this argument, finding that uniformity is not a goal of the guidelines with respect to probation revocations; sentencing uniformity would not result from applying the guidelines in this case because the defendant is not a recent offender; and citing *ex post facto* concerns. "Finally, and more importantly, this court has held that defendants sentenced under the guidelines must, upon the revocation of their probation, be sentenced in accordance with the sentences available at the time they were originally sentenced." *See United States v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Cook, 291 F.3d 1297 (11th Cir. 2002). The defendant argued that the district court erred by imposing a probation revocation sentence above the recommended imprisonment range in Chapter Seven of the *Guidelines Manual*. The Eleventh Circuit affirmed because 18 U.S.C. § 3553(a)(4)(B) requires a district court only to consider the Chapter Seven policy statements in determining a revocation sentence.

APPLICABLE GUIDELINES/*EX POST FACTO*

See United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997), §1B1.11, p. 5.

United States v. Diaz, 26 F.3d 1533 (11th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995). The defendant argued that the district court violated the *Ex Post Facto Clause* by refusing to grant him an acceptance of responsibility reduction based on the amended USSG §3E1.1 commentary, which took effect after he was convicted, but before he was sentenced. In rejecting this argument, the circuit court held that the commentary to USSG §3E1.1 merely confirms this circuit's prior interpretation of USSG §3E1.1; accordingly, it does not implicate *ex post facto* concerns.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Jones, 143 F.3d 1417 (11th Cir. 1998). The district court's error in failing to advise the defendant at his Rule 11 plea colloquy of the statutory mandatory minimum penalties was harmless where a signed, written plea agreement describing a mandatory minimum sentence is specifically referred to during the plea colloquy.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 201(c)(2)

United States v. Lowery, 166 F.3d 1119 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999). The Eleventh Circuit held that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. § 201(c)(2), the statutory prohibition against bribing witnesses. The court noted that, if, as argued, the language of the statute did plainly provide that it is a crime for the government to trade leniency for testimony, the issue would have been raised early and often.

18 U.S.C. § 924(c)

See United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998), §2K2.4, p. 30.

18 U.S.C. § 2326

United States v. White, 118 F.3d 739 (11th Cir. 1997). In a case of first impression, the Eleventh Circuit held that district courts cannot apply the sentencing guidelines of the Senior Citizens Against Marketing Scams Act (SCAMS Act), 18 U.S.C. § 2326, to increase criminal penalties for fraud prosecuted under an unlisted federal statute. The court refused to extend the SCAMS Act to apply to 18 U.S.C. § 2314 because Congress did not specifically list this statute under the SCAMS Act.

21 U.S.C. § 851

United States v. Brown, 47 F.3d 1075 (11th Cir. 1995). In deciding an issue of first impression in the Eleventh Circuit, the appellate court adopted the reasoning of four other circuits holding that 21 U.S.C. § 851 permits the government to seek an enhanced penalty (here, life imprisonment for a defendant guilty of a drug offense involving more than five kilograms of cocaine), where the offense was committed after "two or more convictions for felony drug offenses have become final." The defendant argued that the enhancement was inapplicable because his prior offenses had been state offenses, convicted upon the filing of informations, rather than upon indictments or waivers of indictment. The appellate court followed *United States v. Espinosa*, 827 F.2d 604 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988); *United States v. Adams*, 914 F.2d 1404 (10th Cir.), *cert. denied*, 498 U.S. 1015 (1990); *United States v. Burrell*, 963 F.2d 976 (7th Cir.), *cert. denied*, 506 U.S. 928 (1992); and *United States v. Trevino-Rodriguez*, 994 F.2d 533 (8th Cir. 1993), in holding that 21 U.S.C. § 851(a)(2) requires only that the "instant offense" be brought by indictment or waiver of indictment, and not the prior offenses.

Post-*Apprendi (Apprendi v. New Jersey, 530 U.S. 466 (2000))*

United States v. Cabeza, 258 F.3d 1256 (11th Cir. 2001). The Eleventh Circuit held that the *Apprendi* rule did not apply to forfeiture proceedings following a criminal conviction. The defendant was convicted of possession with intent to distribute cocaine and conspiracy to possess with intent to distribute, and was required to forfeit her real property. On appeal, the defendant argued that under *Apprendi*, the district court erred in instructing the jury to apply the preponderance of the evidence standard to the forfeiture proceedings. *Id.* at 1257. However, the court held that because forfeiture was a punishment and not an element of the offense, it did not fall within the reach of *Apprendi*. *Id.*

United States v. Davis, 329 F.3d 1250 (11th Cir.), *cert. denied*, 124 S. Ct. 330 (2003). On appeal, the defendants argued that the district court's imposition of consecutive sentences violated the rule in *Apprendi*, in that the total term of imprisonment exceeded the guideline range for any count for which defendants were convicted. The Eleventh Circuit noted that the rule in *Apprendi* only applied where a defendant was sentenced above the statutory maximum sentence for an offense. *Apprendi* did not prohibit a sentencing court from imposing consecutive sentences on multiple counts of conviction as long as each was within the applicable statutory maximum. Accordingly, the district court's sentence was affirmed.

United States v. Gallego, 247 F.3d 1191 (11th Cir. 2001), *cert. denied*, 535 U.S. 1095 (2002). Four defendants were members of a drug conspiracy and were convicted of conspiracy, possession of cocaine, robbery and firearms violations pursuant to an indictment that did not specify drug quantity. Pursuant to *Apprendi*, the Eleventh Circuit has held that in drug cases under 21 U.S.C. § 841, the quantity of drugs must be charged in the indictment and proven to a jury beyond a reasonable doubt if a defendant is to be sentenced under a penalty provision of section 841 which contains a quantity amount. If an indictment contains no allegations of drug quantity and the jury convicts without making a quantity determination, a defendant will only be subject to section 841(b)(1)(C), which requires a sentence of not more than 20 years. One defendant was sentenced for two counts to two concurrent sentences of 168 months, one to 324

months, and two to life imprisonment. There was no *Apprendi* violation for the first defendant because the sentence imposed fell below the 20-year maximum prescribed by section 841(b)(1)(C). There was an Apprendi violation in the second defendant's sentence because his 324-month sentence exceeded the 20-year maximum. However, the error did not affect the defendant's substantial rights. He admitted that he personally possessed four kilograms of cocaine and therefore the amount was not in controversy, and it exceeds the threshold amount necessary for sentencing under section 841(b)(1)(B), which prescribes a sentencing range of 5 to 40 years' imprisonment. The third defendant similarly did not contest the testimony that he possessed 25 kilograms of cocaine. Because the jury convicted him of possession, there was no way it could have convicted him for the substantive offense and still determined the quantity involved was less than five kilograms. Section 841(b)(1)(A) authorizes a sentence of ten years to life imprisonment and therefore his substantial rights were also not affected. The fourth defendant pled guilty in state court to possession of ten kilograms of cocaine, and because this cocaine constituted part of the federally charged conspiracy, the jury found more than the required amount to sentence him to life imprisonment. *United States v. Candelario*, 240 F.3d 1300, 1311-12 (11th Cir.), *cert. denied*, 533 U.S. 922, *reh'g denied*, 533 U.S. 973 (2001) (same); *United States v. Swatzie*, 228 F.3d 1278, 1283-84 (11th Cir.), *reh'g en banc denied*, 245 F.3d 797 (2000), *cert. denied*, 533 U.S. 953 (2001) (same).

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001). The Eleventh Circuit found that failure to submit the issue of drug quantity to the jury was harmless error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Apprendi requires the judge to submit to the jury an element of sentencing that would increase the sentence beyond the statutory maximum. The defendant, who had a prior felony drug conviction, was sentenced under section 841(b) to 32 years for possession with intent to distribute an uncontested amount of 14.8 grams cocaine base. Under section 841(b), a person with a prior felony drug conviction convicted with at least 5 grams may be sentenced from 10 years to life, yet the maximum sentence under section 841(b)(1)(A) absent drug quantity is 30 years. The circuit court held that no reasonable jury could have rationally found the defendant guilty of the substantive offense of possession with intent to distribute 14.8 grams of cocaine base, but that the amount of cocaine possessed was less than 5 grams.

United States v. Pease, 240 F.3d 938 (11th Cir.), *cert. denied,* 534 U.S. 967 (2001). The district court committed error under *Apprendi* when it sentenced the defendant to an enhanced sentence based on drug quantity despite the failure of the indictment to charge a specific quantity, but the error was harmless. The defendant pled guilty to conspiracy to distribute cocaine and was sentenced to 30 years' imprisonment. He claimed because the indictment failed to specify drug quantity, the maximum sentence to which he should have been exposed was 20 years' imprisonment. The Eleventh Circuit found error, but stated the error was harmless because in both his plea agreement and during the plea colloquy, the defendant admitted he had accepted delivery of three kilograms of cocaine, more than enough for the statutory range of from 5 to 40 years. *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001).

See United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) *en banc, cert. denied*, 535 U.S. 942 (2002), §1B1.3, p. 3.